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No. 07-

IN THE

# Supreme Court of the United States

ANDREW J. ORKIN, F. MARK ORKIN
and SARAH-ROSE JOSEPHA ADLER,

*Petitioners,*

*v.*

ELIZABETH TAYLOR,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether three 1998 federal statutes intended to address the plight of Holocaust victims and to facilitate the restitution of property taken from them during the Nazi era create an implied private right of action for the recovery of works of art by their heirs.

2. Whether the consistent U.S. public policy since 1947, mandating the restitution of such property without regard to the rights of intervening purchasers or statutes of limitations, requires uniform national rules governing actions to recover such property.

3. Whether and under what circumstances a Rule 12(b)(6) motion to dismiss a facially valid complaint on the grounds of the statute of limitations requires a hearing to determine whether a plaintiff exercised sufficient due diligence in investigating the facts before commencing suit.

## PARTIES TO THE PROCEEDING

The petitioners are Andrew J. Orkin, F. Mark Orkin and Sarah-Rose Josepha Adler. A. Heinrich Zille was a plaintiff in the District Court and an appellant in the Court of Appeals. However, he died on May 8, 2006 and his estate is being served as a respondent. Respondent is Elizabeth Taylor.

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# PETITION FOR A WRIT OF CERTIORARI

Petitioners Andrew J. Orkin, F. Mark Orkin and Sarah-Rose Josepha Adler respectfully petition for a writ of certiorari to review a judgment of the U.S. Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

On May 18, 2007, the U.S. Court of Appeals for the Ninth Circuit entered a judgment affirming an order of the U.S. District Court for the Central District of California, entered April 4, 2005, which granted respondent's motion to dismiss the complaint pursuant to F.R.Civ.P. 12(b)(6).

The District Court opinion is not reported in the Federal Supplement, but is at 2005 WL 4658511. The Court of Appeals opinion is at 487 F.3d 734. Both opinions are reprinted in full in the appendix to this petition, at 1a-28a.[1]

## JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(a) in that a final judgment was rendered by a United States Court of Appeals.

This petition is timely, being filed within 90 days of the entry of final judgment of the Court of Appeals on May 18, 2007, pursuant to this Court's Rule 13 subd. 1. The judgment is thus within this Court's jurisdiction and is reviewable by writ of certiorari.

The District Court and the Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1332, in that all of the petitioners are foreign citizens, the respondent is a citizen of the

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[1] References herein to pages denoted "a" are to pages in the appendix.

State of California and the value of the painting in controversy is well in excess of $75,000.

Jurisdiction was also asserted pursuant to 28 U.S.C. § 1331, in that some of petitioners' claims were brought pursuant to three 1998 statutes: the Holocaust Victims Redress Act, Pub. L. 105-158, 112 Stat. 15, the Nazi War Crimes Disclosure Act, Pub. L. 105-567, 114 Stat. 2865, and the United States Holocaust Assets Commission Act, Pub. L. 105-186, 112 Stat. 611. Neither the Court of Appeals nor the District Court addressed whether federal question jurisdiction existed pursuant to these statutes.

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the three above-cited statutes, two California statutes and Military Government Law No. 59 are reproduced in the appendix at 29a-35a, 35a-39a and 40a-44a respectively.

## STATEMENT OF THE CASE

In 1889, Vincent van Gogh entered the asylum of Saint-Paul-de-Mausole near Saint-Rémy-de-Provence. In the late summer of that year, he painted *Vue de l'Asile et de la Chapelle de Saint-Rémy*. Less than a year later, he had killed himself. After his death, the painting passed to his brother Theo's widow. The German art dealer Paul Cassirer, an early promoter of the works of van Gogh and other post-impressionists, purchased the painting in 1906 or 1907.

Petitioners' great-grandmother Margarethe Mauthner (1863-1947) lived in Berlin. She was Jewish, a noted translator and advocate of the arts, and a friend of Cassirer's. Around 1905, she authored a German translation of van Gogh's letters. In 1906 or 1907, she purchased the painting from Cassirer. Two editions of the leading and presumptively correct van

Gogh *catalogues raisonné*, published in 1939 and 1970 by a Belgian lawyer and van Gogh scholar named Dr. J.B. de la Faille, establish that Mauthner was the owner of the painting well into the late 1930's, perhaps as late as 1938 or 1939.

From 1933 until the end of World War II in 1945, Adolf Hitler's Nazi regime engaged in the systematic dispossession of Jews, first of everything they owned and then *en masse* of their very lives. This campaign included the confiscation and forced sale of works of art in Germany and then throughout Europe. The enactment in 1938 of the Ordinance for the Attachment of the Property of the People's and State's Enemies, and the Ordinance for the Employment of Jewish Property, among many other such ordinances, gave Nazi officials the authority to seize, or to force the sale to Aryans of, the property of Jews, including works of art, under color of law.

It has been estimated that during those years more than 600,000 works of art were confiscated or otherwise taken from Jews by the Nazi regime. According to a post-war estimate by the U.S. Government, this policy resulted in the looting of an astonishing one-fifth of all Western art in Europe. Subsequent investigations have estimated the number as even higher, between one-fourth and one-third.

As conditions in Germany became intolerable, Mauthner finally fled Germany for South Africa in March 1939 with her small family group (her daughter, son-in-law and two grandchildren), having by then lost her livelihood and most of her property due to the Nazi policies of coercion, including the family home, the painting and other works of art.

Mauthner eked out her remaining years as a refugee in Johannesburg, caring for her ailing daughter, Edith Pinkuss, who predeceased her. Mauthner died at the age of 84 in 1947. Mauthner's son-in-law and immediate heir, Adolph Israel Orgler (petitioners' grandfather), died in 1964 in Johannesburg at the age of 86 after a long illness. Mauthner and Orgler's immediate heirs, Else Orkin née Orgler (petitioners' mother) and Irmgard Zille née Orgler, were young adults when they left

Germany. Irmgard Zille lived just long enough to participate in the initiation of this litigation below.

In 1947, the U.S. Military Government in Germany enacted Military Government Law No. 59 ("MGL 59")(40a-44a). This law required the restitution of all looted property to their former German Jewish owners, and deemed that all property losses they suffered between 1933 and 1945 were the direct result of Nazi persecution.

In 1946, the U.S. Treasury Department, in response to pressure from the U.S. art industry and auction houses, had revoked a directive which had prohibited the importing of artworks from Nazi-occupied countries. It issued a circular letter to U.S. museums, auction houses and dealers, saying that although the legal restriction on such importation had been lifted, precautions against acquiring such artworks were still essential. In 1951, the U.S. State Department issued a second circular letter to the U.S. art industry reiterating this warning. It is believed that Taylor's father, as a professional art dealer in Los Angeles and New York during these years, was aware of both letters.

In so doing, the U.S. Government underscored the importance to the art trade of accounting for provenances for European art after the war. However, one unfortunate side effect of these principled U.S.-led policies was to encourage the concealment and alteration of these provenances for decades to come, by many participants in the trade.

In the early 1960's, the estate of Alfred Wolf, who then possessed the painting, engaged Sotheby's in London to auction a number of Impressionist and post-Impressionist paintings, including *Vue de l'Asile et de la Chapelle de Saint-Rémy*. With respondent Elizabeth Taylor's father, an experienced London art collector and dealer, acting as her advisor and agent, Taylor had begun collecting European art in the early 1950's, mostly works by French Impressionists including Degas, Renoir, Pissarro, Monet and Cassatt. She had long wanted to acquire a van Gogh. While living in London, Taylor learned that the

painting would be sold at a Sotheby's auction in April 1963. She authorized her father to bid for her at the auction, and he succeeded in purchasing it on her behalf for £92,000. It is worth millions today.

Taylor's purchase received some publicity at the time, and the 1970 de la Faille *catalogue raisonné* lists her as the most recent owner. In 1990, Taylor offered the painting for sale through Christie's auction house in London, which prepared a sales brochure for her, but it did not sell.

The bibliography section in the Christie's/Taylor 1990 auction brochure referenced the 1928 and 1939 editions of de la Faille's *catalogues raisonné.* However, while the 1939 edition establishes Mauthner's ownership into the late 1930's, that crucial detail was not disclosed in the brochure, which says only that Mauthner "kept the picture until at least 1928" Thus, the fact of Mauthner's 1939 ownership during the Nazi era was obscured from the public.

The authoritative 1970 edition of the de la Faille *catalogue raisonné* (prepared at the behest of the Dutch government by a committee of leading van Gogh scholars) records the immediate next owner of the painting (after Mauthner in 1938 or 1939) as Alfred Wolf, a businessman who left Germany for Switzerland (which was a center for the re-selling of Nazi gold and art) in 1934 and then went to South America in the early 1940's.

However, the 1963 Sotheby's brochure (produced when Taylor purchased the painting) attempted to account for the ownership of the painting between 1928 and 1945 by adding two apparently fictitious (according to the 1939 *catalogue raisonné*) owners between Mauthner and Wolf. The brochure says that ownership passed from Mauthner back to Paul

Cassirer, then to a Marcel Goldschmidt, and only then to Alfred Wolf. But Cassirer had committed suicide in 1926.[2]

This "error" was partially repeated in the 1990 Christie's brochure:

> Cassirer sold the picture in May 1907 to Margarete Mauthner and her Berlin publisher husband, Eduard. Margarete Mauthner had, only the year before, translated and produced for Bruno Cassirer a German edition of selected van Gogh letters...the Mauthners were close friends of the Cassirer cousins, Paul and Bruno. They purchased at this period at least three other van Gogh pictures...and two drawings...from Paul Cassirer and were thus among the first and most important collectors and patrons of van Gogh's work in Germany. They kept the picture until at least 1928 when Cassirer again exhibited it in Berlin. Subsequently it passed to the dealer Marcel Goldschmit in Frankfurt and the Munich-Stuttgart collector, Alfred Wolf.

In 1998, Congress enacted, and the President signed into law, three statutes to provide redress to victims of Nazi persecution: the Holocaust Victims Redress Act, Pub.L. No. 105-158, 112 Stat. 15 (1998), the Nazi War Crimes Disclosure Act of 1998, Pub.L. No. 105-167, 114 Stat. 2865 (1998), and the United States Holocaust Assets Commission Act of 1998, Pub.L. No. 105-186, 112 Stat. 611 (1998).

The petitioners are middle-class siblings who now reside in Canada and South Africa, and were all born after the war in the 1940's and early 1950's. None has any special art knowledge or expertise. Although they and their parents were

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[2] http://www-sul.stanford.edu/depts/spc/xml/m0287.xml (last visited August 15, 2007).

vaguely aware that Mauthner had been a collector of European art, including that of van Gogh, they–like thousands of other Holocaust-era victims and heirs only now pressing restitution claims in the United States and elsewhere–did not learn that they had a possible claim to the painting until after 2000. In particular, it was the enactment of these statutes, and the remedies they made available, that first impelled them to investigate whether Mauthner may have lost some of her art collection due to Nazi persecution and whether they had a legal right to recover the van Gogh painting.

Had the petitioners relied solely upon the seemingly authoritative information provided in Sotheby's, Christie's and Taylor's promotional sales brochures in 1963 or 1990, they would have been grossly misled about Mauthner's ownership of the painting during the Nazi era. They would in fact have reasonably concluded that they had no claim to the painting at all, because Sotheby's, Christie's and Taylor had all asserted, in effect, that Mauthner had freely parted with the painting by 1928, five years before Hitler came to power in 1933.

Only after retaining U.S. counsel, and conducting extensive expert investigation in Europe, South America and the U.S., aided by the 1998 statutes and the machinery they set up, were petitioners finally able to begin to dispel the self-serving fog of incomplete and even false provenance information that has been presented as established fact by various interested parties over the decades, including to the lower courts in this case.

## THE PRESENT ACTION

In 2001, petitioners retained a Washington, D.C. law firm to investigate the factual basis for their claim to the painting. Until the investigation was completed in late 2002, they simply did not know, and could not readily have discovered with any reasonable level of due diligence:

(a) that Mauthner was registered in the 1939 edition of a presumptively correct reference work as having owned the painting into the late 1930's in Berlin;

(b) that she had surely lost it as a result of Nazi persecution, including through the presumption of MGL 59;

(c) that Taylor had bought the painting in London in 1963 using her expert art dealer father as her agent;

(d) that there were serious questions as to Taylor's knowledge about the Holocaust-era ownership of the painting when she bought it in 1963, and her status as a good-faith purchaser, including her acceptance of a disclaimer of warranty of title, both by Sotheby's and the seller;

(e) that Taylor's 1990 sales brochure was materially incomplete and misleading; and

(f) that these facts gave petitioners a legal basis to recover the painting in the United States.

In December 2003, petitioners wrote a letter to Taylor, informing her of their claim and requesting the return of the painting. She rejected their demand as untimely, and then, after requesting that they allow her six months to conduct her own investigation, suddenly sued petitioners for a declaratory judgment, seeking to clear her title.

On October 16, 2004, petitioners responded by commencing the present action in the U.S. District Court for the Central District of California, asserting causes of action for specific recovery, replevin, constructive trust, restitution and conversion. They filed an amended complaint on January 11, 2005.

On November 8, 2004,Taylor moved to dismiss the complaint pursuant to F.R.Civ.P. 12(b)(6), alleging that the statute of limitations had expired, that title had conclusively passed to Taylor pursuant to English law six years after she purchased it, that there was no private right of action under the three 1998 statutes, and that a California statute extending through 2010 the statute of limitations for recovery of

Holocaust-looted art (36a-39a) applied only to museums and galleries, not private persons.

In their opposition to the motion, petitioners asserted that the Holocaust Victims Redress Act gave them an implied right of action under *Cort v. Ash*, 422 U.S. 66, 78 (1975), and that equitable principles tolled the statute of limitations. Furthermore, MGL 59 had established a presumption that any works of art in Germany during the Nazi years were stolen and acquired wrongfully, even as against good faith purchasers, and Taylor was not a good-faith purchaser in any event, since she was on notice when she bought the van Gogh that title was at best questionable and at worst fraudulent.

On February 4, 2005, the District Court granted Taylor's motion (and in a separate opinion dated March 27, 2005 denied her declaratory judgment claim), concluding that the state-law claims were time-barred and that the 1998 statutes did not create a private right of action. The District Court ignored petitioners' allegations as to the equities of Taylor's purchase, which cast grave doubt on her claim to be a good-faith purchaser, and whether her unclean hands equitably tolled the statute of limitations.

Petitioners then appealed to the U.S. Court of Appeals for the Ninth Circuit. The Court affirmed the District Court, on the ground that the three statutes did not create a private right of action under *Cort v. Ash*. The Court also held that the petitioners' claims were time-barred, and that under California law, their causes of action accrued when they discovered or reasonably could have discovered their legal claim to, and the location of, the painting. At the latest, said the Court, that would have been in 1990, when Taylor offered it for sale, and at the earliest in 1963 when she bought it at a publicized auction. The Circuit Court did not address petitioners' allegations that Taylor was not a good-faith purchaser, and that they were entitled to an equitable tolling of the statute of limitations.

## REASONS FOR GRANTING THE PETITION

1. The applicability of a statute of limitations to bar an otherwise well-pleaded complaint cannot be decided on a Rule 12(b)(6) motion, and the resolution of the many conflicting allegations in this case should have been the subject of a plenary evidentiary hearing. Given the facial validity of the complaint[3], the factual complexity of the statute of limitations defense and the availability of equitable tolling should not have been determined on papers alone.

This Court's recent decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S.___, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) has been highly significant in the lower courts in the less than three months since it was decided.[4] This case affords an opportunity to extend that decision to address the appropriate standards for adjudicating affirmative defenses raised in the context of 12(b)(6) motions, and whether plaintiffs are entitled to evidentiary hearings to adjudicate fact-based affirmative defenses against complaints which unquestionably state claims.

2. There are conflicts among the Circuit Courts as to the proper method for litigating these cases, and when the various statutes of limitations accrue, leading to intolerably inconsistent results. This conflict seriously undermines the strong and long-standing U.S. public policy U.S. public policy that property stolen during the Holocaust should be restituted to its rightful owners, regardless of any statute of limitations defenses.

The issue is of pressing importance, given the advanced age of Holocaust survivors and their heirs. Moreover, in the

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[3] The District Court specifically held that petitioners had stated claims, 2005 WL 4658511 at *3.

[4] It has been cited 457 times by the lower courts, http://writ.lp.findlaw.com/dorf/20070813.html (last visited August 14, 2007).

past decade, claims for recovery of such property have increased greatly. Given the already substantial difficulties of proof in these cases, the Court should extend its ruling in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), and provide guidance to litigants and courts in pursuing and resolving these claims.

3. The Ninth Circuit refused to follow controlling authority from an intermediate California appellate court. Such refusal is grounds for granting the writ, and even for summary reversal.

4. The public policy of the United States, as expressed as recently as the three 1998 statutes, and as early as the 1947 MGL 59, is that persons whose property was stolen or abandoned during the Nazi era are entitled to press claims to recover it, and that their rights to do so are absolute, regardless of the intervening rights of subsequent purchasers. Additionally, in 1986, the U.S. State and Justice Departments, and the U.S. Information Agency, said that a requirement for discovery and due diligence would create a haven for stolen art, and successfully urged the veto of a bill in New York which would have created such a requirement. Thus, the judgment of the Ninth Circuit is in conflict with the long-standing and often-repeated public policy of the United States.

Because of this public policy, there should be uniform procedures for determining such claims brought by private persons. This Court should declare that the 1998 statutes created an implied right of action, and that members of the class of persons identified by the statutes have the right to seek equity and justice for their claims.

## POINT I

## THE LOWER COURTS IMPROPERLY RESOLVED FACTUAL ISSUES REGARDING THE STATUTE OF LIMITATIONS, LACHES AND EQUITABLE ESTOPPEL WITHOUT A HEARING.

Generally a statute of limitations defense may not be raised in the context of a Rule 12(b)(6) motion unless the untimeliness of the claim appears on the face of the complaint. Otherwise, the plaintiff is entitled to an evidentiary hearing, and if matters outside the complaint are submitted in support of the motion, the Court can treat the motion as one for summary judgment pursuant to Rule 56, after notice to the parties. *Robinson v. Johnson*, 313 F.3d 128 (3rd Cir.1997); *Oaxaca v. Roscoe*, 641 F.2d 386 (5th Cir.1981); *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434 (6th Cir.1988); *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir.1980). *Cf. Jones v. Bock*, 550 U.S.___ at ___, 127 S.Ct. 910 at 920-21 (2007).

But here, the allegations in the complaint did *not* demonstrate on their face that the claims were barred by the statute of limitations. Taylor's motion to dismiss was not directed to the face of the complaint, and it included substantial additional material, including affidavits. The issues were factually complex (and disputed) ones of the statute of limitations, laches and equitable tolling. Under the circumstances, the lower courts should not have dismissed the complaint without a hearing.

There were other procedures which could have been followed other than summary dismissal on the basis of complex and disputed facts. F.R.Civ.P. 12(d) provides for a preliminary hearing when a defendant moves pursuant to 12(b)(6). That would have been one appropriate procedure here, or the District Court could have reserved the issue for trial, preserving petitioners' Seventh Amendment right to a jury; or at the least

it could have proceeded according to the last sentence of Rule 12(b) and treated the motion to dismiss as one for summary judgment, giving the parties time to submit anything admissible on a Rule 56 motion. Instead both lower courts speculated as to the true facts and drew wholly unwarranted conclusions.

In effect, the District Court converted the 12(b)(6) motion to one for summary judgment, without giving the required notice to the parties, and the Court of Appeals approved this improper procedure. *See* Wright & Miller, 5 *Federal Practice & Procedure* § 1277 at 628:

> One objection to permitting the defense of limitations to be raised by motion, even when it appears to be available from a reading of the complaint, however, is that there may be facts tolling the running of the statute, such as by equitable estoppel, that do not appear in the complaint, which means that the motion to dismiss might be premature and simply promote unrewarding motion practice or, what is worse, lead to an improvident termination of the action.

If anything, the District Court and the Court of Appeals should have held that the statute of limitations was subject to equitable tolling, and it had sufficient evidence before it to justify a hearing, especially in a case of such national importance as this one. "Time requirements in lawsuits between private litigants are customarily subject to equitable tolling." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990), *rehearing den.*, 498 U.S. 1075 (quotation marks omitted). "We consider it much more consistent with the overall congressional purpose to apply a traditional equitable tolling principle, aptly suited to the particular facts of this case and nowhere eschewed by Congress, to preserve petitioners' cause of action." *Honda v. Clark*, 386 U.S. 484, 501 (1967) (statute of limitations tolled for Japanese-Americans' suit to recover funds vested under the Trading with the Enemy Act;

public funds not at issue); *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir.1996)(widespread human rights violations during the Marcos era equitably tolled statute of limitations for class action claim under § 1983).

> Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights. *This policy of repose, designed to protect defendants, is frequently outweighed, however, where the interests of justice require vindication of the plaintiff's rights.*

*Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 428-29 ( footnote, citations and quotation marks omitted; emphasis added).

## POINT II

## THE SECOND CIRCUIT CASES DEMONSTRATE THE CORRECT APPROACH, AND THEY CANNOT BE RECONCILED WITH HOLDINGS FROM THE SIXTH, SEVENTH, EIGHTH AND NINTH CIRCUITS.

There have been irreconcilable rulings by the Circuit Courts which have addressed the issue of stolen art. Such

conflicts are a ground for granting the writ, particularly given the need for uniformity of decisions on the issues raised by this case, and the official U.S. policy to foster the restitution of Nazi-looted art. S. Ct. Rule 10(a); *Thompson v. Keohane*, 516 U.S. 99, 106 (1995); *Marks v. U.S.*, 430 U.S. 188, 189 (1982).

**The Second Circuit**

The New York federal and state cases uniformly hold that the statute of limitations for a replevin claim runs from the date of demand for return of the property and its refusal. The earliest case is *Menzel v. List*, 22 A.D.2d 647, 253 N.Y.S.2d 43 (1st Dept.1964), *on remand* 49 Misc.2d 300, 267 N.Y.S.2d 804 (Sup.Ct.1966), *mod. as to damages*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1967), *rev'd as to modifications*, 24 N.Y.2d 91, 298 N.Y.S.2d 979, 246 N.E.2d 742 (1969). Plaintiff and her deceased husband had bought a Chagall painting in Brussels at auction in 1932. In 1940, the German army invaded Belgium and plaintiff and her husband had fled, leaving the painting. Six years later, they returned home to find a receipt in place of the painting, the German army having removed it as "degenerate art" in 1941. A New York dealer, Klaus Perls, purchased it in 1955 from a Paris art gallery and later sold it to defendant Albert List, and plaintiff sued List in replevin. In 1962, she had noticed a reproduction of the painting in an art book, which identified List as the owner. List in turn sued Perls.

On appeal from denial of a motion to dismiss the action as time-barred, the Appellate Division, First Department said that "with respect to a bona fide purchaser of personal property a demand by the rightful owner is a substantive, rather than a procedural prerequisite to the bringing of an action," (253 N.Y.S.2d at 44) and that the statute of limitations should not begin to run until demand and refusal occurred. After trial, plaintiff was awarded the painting. List was awarded damages against Perls in the amount of the painting's fair market value,

and Perls was left to sue the Paris art gallery from whom he had bought it in 1955.

In ruling on the statute of limitations defense and the argument that the plaintiff had abandoned the painting, the trial court said, "in replevin, as well as in conversion, the cause of action against a person who lawfully comes by a chattel arises, not upon the stealing or the taking, but upon the defendant's refusal to convey the chattel upon demand...The relinquishment here by the Menzels in order to flee for their lives was no more voluntary than the relinquishment of property during a holdup." 267 N.Y.S.2d at 809-10. Furthermore, "provisions of law for the protection of purchasers in good faith which would defeat restitution [of Nazi confiscations] shall be disregarded." (267 N.Y.S.2d at 819; citing MGL § 59).

This interpretation of the statute of limitations was followed in *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150 (2nd Cir.1982), which found *Menzel* controlling. Then in *DeWeerth v. Baldinger*, 836 F.2d 103 (2nd Cir.1987), *cert. den.*, 486 U.S. 1056 (1988), the Second Circuit added a requirement that, although demand and refusal were still required, the owner had to exercise due diligence prior to making a demand.

But three years later, in *Solomon R. Guggenheim Foundation v. Lubell*, 77 N.Y.2d 311, 569 N.E.2d 426, 567 N.Y.S.2d 623 (1991), the New York Court of Appeals firmly established that the sole prerequisite for a replevin claim in "the New York City art market, where masterpieces command extraordinary prices at auction and illicit dealing in stolen merchandise is an industry all its own," (567 N.Y.S.2d at 624) was a demand and refusal. A laches defense would remain available to a good-faith purchaser against the claim, but there was no requirement on the owner to establish due diligence, the Court saying "we conclude that the Second Circuit [in *DeWeerth*] should not have imposed a duty of reasonable diligence on the owners of stolen art work for purposes of the Statute of Limitations." 567 N.Y.S.2d at 627.

Of great significance to the present case is that, as described in *Lubell*, New York State had specifically rejected the discovery rule. In 1986, the Legislature passed a bill which would have added a discovery rule in replevin actions against certain not-for-profit institutions, and would have required them to give notice that they possessed certain objects in order to commence the running of the statute of limitations. But the Governor vetoed the bill, upon the advice of the U.S. Departments of State and Justice, and the U.S. Information Agency (*see 3 U.S. Agencies Urge Veto of Art-Claim Bill*, New York Times, July 23, 1986, at C15, col. 1). The main reason for the U.S. Government's extraordinary intervention in the enactment of a State statute was that if the bill became law, it would have caused New York to become "a haven for cultural property stolen abroad since such objects [would] be immune from recovery under the limited time periods established by the bill." 567 N.Y.S.2d at 627.

Thus it may be seen from the U.S. urging the Governor to veto the bill that U.S. policy firmly rejected the discovery requirement. To say the least, it is highly unusual for the U.S. Government to take a position on a State law which does not implicate any federal right, and that it did so here demonstrates the importance of the issue on the national level.

The Court of Appeals then said (567 N.Y.S.2d at 628):

> To place the burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would, we believe, encourage illicit trafficking in stolen art. Three years after the theft, any purchaser, good faith or not, would be able to hold onto stolen art work unless the true owner was able to establish that it had undertaken a reasonable search for the missing art. This shifting of the burden onto the wronged owner is inappropriate. In our opinion, the better rule gives the owner relatively greater protection

> and places the burden of investigating the provenance of a work of art on the potential purchaser.

Following the unequivocal rejection in *Lubell* of a due diligence requirement, the parties in *DeWeerth* returned to court. But ultimately the Second Circuit ruled that the finality of its earlier judgment prevailed over "any injustice DeWeerth believes she has suffered by litigating her case in the federal as opposed to state forum." *DeWeerth v. Baldinger*, 38 F.3d 1266, 1275 (2nd Cir.1994), *cert.den.* 513 U.S. 1001.

The Second Circuit followed the holding of *Lubell,* in *Hoelzer v. City of Stamford*, 933 F.3d 1131 (2nd Cir.1991) and *Golden Buddha Corp. v. Canadian Land Co. of America, N.V.*, (2nd Cir.1991).

**The Sixth Circuit**

*See Charash v. Oberlin College*, 14 F.3d 291, (6th Cir.1994)(claim accrues upon discovery of the wrongdoer, but whether plaintiff had constructive notice was a jury question; reversing summary disposition); *Toledo Museum of Art v. Ullin*, 477 F.Supp.2d 802, 806 n.2 (N.D.Ohio 2006)("The Court acknowledges the strong public policy to resolve claims for Nazi-era artwork. However, unlike some states, Ohio law does not contain a special statute of limitations for Nazi-era artwork."); *Detroit Institute of Arts v. Ullin*, 2007 WL 1016996 (E.D.Mich. Mar. 31, 2007). Thus in the Sixth Circuit, the statute of limitations runs from when the claimant should reasonably have discovered the identity of the wrongdoer, but it is an issue of fact.

**The Seventh Circuit**

In the *Byzantine Mosaics* case, *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.*, 917 F.2d 278 (7th Cir.1990), *cert.den.* 502 U.S. 941, the Court awarded possession of mosaics to the Church of

Cyprus. They had been stolen and purchased by a gallery owner in Indiana, but the Court rejected the argument that the suit was untimely, saying that the plaintiffs had exercised due diligence in searching for the mosaics and identifying the defendants. The issue of due diligence was determined after a plenary trial. The Court said, "those who wish to purchase art work on the international market, undoubtedly a ticklish business, are not without means by which to protect themselves. Especially when circumstances are as suspicious as those that faced Peg Goldberg, prospective purchasers would do best to do more than make a few last-minute phone calls. As testified to at trial, in a transaction like this, 'All the red flags are up, all the red lights are on, all the sirens are blaring.'" 917 F.2d at 294.

**The Ninth Circuit**

By contrast with the rules in the Second, Sixth and Seventh Circuits, the Ninth Circuit held in the case under review that not only are claimants required to exercise due diligence, but that whether they did so or not could be determined summarily, without even a hearing. The holding is contrary to the law regarding the general requirement that the court must hold a hearing on a Rule 12(b)(6) motion based on laches or the statute of limitations, contrary to the protective view of the Second Circuit, which only requires that a claim be brought following a demand and refusal, and contrary to the consistent and reiterated public policy of the U.S. from 1947 to 1998. Its holding cannot be reconciled with those of the other circuits, which either held that claimants are entitled to hearings on the applicability of statutes of limitations and equitable tolling, and, in the case of the Second Circuit (in the world's premier art market), held that there is no discovery requirement at all, the only issue being demand and refusal.

The Second Circuit's approach is clearly the most favorable to claimants, and does the most to foster the public policy of restitution while discouraging the art market's penchant for trafficking in stolen property. It has also been

endorsed by the U.S. Government, as is shown by its intervention with the Governor in 1986.

## POINT III

## THE NINTH CIRCUIT'S REFUSAL TO FOLLOW *NAFTZGER* IS GROUNDS FOR GRANTING THE PETITION.

Federal courts in diversity cases are bound to follow the decisions of intermediate state appellate courts absent compelling evidence that the highest state court would rule otherwise. *See* Rules of Decision Act, 28 U.S.C. § 1652. Where a Court of Appeals does not do so, its decisions are cause for granting certiorari, and even summary reversal. *See Exxon Company, U.S.A. v. Banque de Paris et des Pays-Bas*, 488 U.S. 920 (1988); *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940); *Six Companies of California v. Highway District*, 311 U.S. 180, 188 (1940)("The Circuit Court of Appeals should have followed the decision of the state court ...and its judgment to the contrary is reversed"). As this Court said in *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236-37 (1940):

> [A] federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable...Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.

In the present case, the Ninth Circuit specifically rejected the holding of *Naftzger v. Am. Numismatic Soc'y*, 42 Cal. App.4th 421, 49 Cal. Rptr.2d 784 (2d Dist.1996), *reh. den.* 42 Cal. App.4th 1806B, *pet'n. for review den.* 1996 Cal.LEXIS 2393 (April 25, 1996), which held that an implied discovery rule applied for works of art, and is squarely on point, in favor of *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 751 P.2d 923 (1988).

*Naftzger* was about stolen rare coins, and it held that Cal. Code Civ. Proc. § 338 (c), which addresses the statute of limitations for "any article of historical, interpretive, scientific, or artistic significance" and which runs from "the discovery of the whereabouts of the article," applied to claims to recover property converted before its enactment in 1983. By contrast, *Jolly* was a tort case involving a woman whose injury arose from her mother's taking DES while pregnant, and who did not even have a cause of action until the California Supreme Court created one a year earlier. It has nothing whatsoever to do with stolen art or property and has no application to the present case.

The Ninth Circuit did not examine, let alone adduce evidence, whether the California Supreme Court would not follow *Naftzger*. Thus the Ninth Circuit erred in applying the clearly inapplicable holding of *Jolly* instead of *Naftzger*'s on point holding. As this Court has frequently held in the above-cited cases and many others, a Circuit Court's refusal to follow controlling state law precedent, even from an intermediate court, is grounds for granting the writ, and even for summary reversal, as in *Exxon, supra*. *See In re Kirkland*, 915 F.2d 1236, 1239 (9th Cir. 1990); *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967)(Douglas, J., dissenting)("we have never suggested that the federal court may ignore a relevant state court decision because it was not entered by the highest state court. Indeed, we have held that the federal court is obligated to follow the decision of a lower state court in the absence of decisions of the State Supreme Court showing that the state law is other than announced by the lower court.")(citations omitted).

## POINT IV

## THE PUBLIC POLICY EXPRESSED IN THE THREE 1998 STATUTES IS ENFORCEABLE THROUGH AN IMPLIED RIGHT OF ACTION.

The Ninth Circuit rejected petitioners' argument that the three 1998 statutes created an implied right of action, stating:

> The district court properly dismissed the Orkins' federal claims on the ground that the Holocaust Victims Redress Act did not create a private right of action against private art owners. In determining whether a federal statute creates a private right of action, congressional intent is the cornerstone of the analysis. The Supreme Court has established a four-factor test for discerning whether a statute creates a private right of action. *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). Under that test, we must ask: (1) whether the plaintiff is a member of a class that the statute especially intended to benefit, (2) whether the legislature explicitly or implicitly intended to create a private cause of action, (3) whether the general purpose of the statutory scheme would be served by creation of a private right of action, and (4) whether the cause of action is traditionally relegated to state law such that implication of a federal remedy would be inappropriate. The most important inquiry under *Cort* is the second factor: whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one...the *Cort* test itself is focused entirely on intent.

487 F.3d at 738-39, 8a (citations and quotation marks omitted).

But having correctly set forth the *Cort* standard, the Court then failed to apply it, holding that the following provision of the Holocaust Victims Redress Act (§ 202, 112 Stat. at 17-18) was merely precatory and created no private right of action:

> It is the sense of the Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.

But the three acts taken together, combined with the statements of its principal sponsor, and President Clinton when he signed them into law[5], demonstrate clearly that private actions were to be encouraged. For example, according to the House sponsors, James A. Leach, Chairman of the Committee on Banking and Financial Services, and Benjamin A. Gilman, Chairman of the Committee on International Relations, "[o]ur bill underscores the fact that the restitution of these works of art to their rightful owners is required by international law and expresses the sense of Congress that governments should take appropriate action to achieve this objective."

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[5] "[w]e have pressed for the restitution of property and for the full declassification of archives so that confiscated assets can be traced and restored to their rightful owners...[I]t is my hope that this bill will hasten the restitution that they undeniably deserve." 34 Weekly Comp. Pres. Doc. 263 (Feb. 20, 1998).

Chairman Leach held a hearing on June 25, 1997, and heard testimony from two art historians and an attorney. He said:

> Chairman Leach:
> Let me underscore one point. We have two historians and one attorney. I take it there is no doubt in anyone's mind that could prove – a Holocaust victim, for instance – If you could prove as an heir that you once owned a confiscated piece of art, you are entitled to retrieve it today under American and most international law. Is that valid?
> Ms. Nicholas: It depends on which jurisdiction...[6]

Chairman Leach later said, "[b]ut most of all, the [Redress Act] is a reminder the past must never be forgotten...history does not have a statute of limitations...The operative principle is simple: stolen property must be returned. Pillaged art cannot come under a statute of limitations. The rape of Europa must not pass without atonement."[7]

To imply a cause of action under these circumstances need not create any federalism concerns. Federal courts have limited jurisdiction, and petitioners do not argue that an implied cause of action under the 1998 statutes is necessarily a federal one. What is clear, however, is that wherever heirs of Holocaust victims may choose (or be obliged) to litigate, the standards should be identical, and not be dependent upon the vagaries of differing state laws regarding statutes of limitations,

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[6] Excerpts from Record on Appeal ("ER") at 85, 130-31.

[7] ER at 100. The full statement may be found at http://financialservices.house.gov/banking/21298lea.htm (last visited August 15, 2007).

equitable tolling, or requirements for due diligence and discovery vs. demand and refusal.

Unless we are to conclude that all of this Congressional language (which is only the latest manifestation of a consistent and strong U.S. public policy since 1947) is nothing more than a cruel joke on the class of people it purports to protect, paying mere lip service to their plight while letting them fend for themselves if they actually try to enforce their rights, it must be concluded that it means something. Congress created rights in enacting these three statutes, and creating a right means creating a remedy, ever since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803): "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." Holocaust theft and profiteering therefrom is such a violation, and the 1998 redress laws must be construed to furnish a private remedy.

## POINT V

## THERE IS A STRONG RECENT TREND TOWARD PERMITTING CLAIMANTS OF HOLOCAUST-ERA ARTWORKS TO SEEK TO RECOVER THEM, REGARDLESS OF THE STATUTE OF LIMITATIONS. THE NINTH CIRCUIT'S DECISION IS COUNTER TO THIS TREND AND CONTRADICTS PUBLIC POLICY.

Further proof that the climate is highly favorable to permitting heirs of Holocaust victims to pursue their claims may be found in this Court's decision in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004). While the case addressed the limited question whether the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605, ("FSIA") applied retroactively, the result (and the clear intention) was that an elderly woman was

permitted to pursue her claim to recover six Klimt paintings which had been long ago stolen from her family by the Nazis and which wound up in the Austrian National Museum.[8] As the Ninth Circuit observed in *Alperin v. Vatican Bank*, 410 F.3d 532, 551 (9th Cir.2005), "that the Court allowed the [*Altmann*] case to proceed underscores that courts have a place in deciding Holocaust-era claims concerning looted assets." Yet the same Court ignored its own conclusion when it dismissed petitioners' case.

Holocaust-era claims will *always* involve long delays in asserting rights, by definition. If the holding in this case is allowed to stand, the courts will have *no* role in resolving them, since they will almost always be dismissed on statute of limitations grounds.

Both *Altmann* and *Alperin* implicated the political question doctrine, because relief was sought against foreign governments and entities. If, in the face of the obstacles and difficulties of that doctrine, and the enormous evidentiary problems faced by plaintiffs[9], the courts have nonetheless allowed claims to proceed, *a fortiori* petitioners here should be allowed to proceed in this purely private dispute. This Court took a tremendous step forward in providing a measure of justice to Maria Altmann and to others similarly situated who

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[8] After this Court's decision remanding the case to the District Court, to avoid further delays (not least because of Ms. Altmann's advanced age), the parties agreed to binding arbitration in Austria, and she was eventually awarded ownership of the paintings. Richard Bernstein, *Austrian Panel Backs Return of Klimt Works*, New York Times, January 17, 2006 (§ E, col. 4).

[9] *See In re Austrian and German Bank Holocaust Litigation*, 80 F.Supp.2d 164, 174-75, 177-78 (S.D.N.Y.2000)(noting the complexity, expense, duration and risk of pursuing Holocaust-era claims through litigation), *aff'd sub nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2nd Cir.2001).

pursue claims against foreign governments; private litigants are entitled to no less.

*See also United States v. Portrait of Wally*, No. 99 Civ. 9940, 2002 U.S. Dist. LEXIS 6445 (S.D.N.Y. Apr. 12, 2002). A painting by Egon Schiele was on display at the Museum of Modern Art in New York, on loan from a museum in Austria. Just as the painting was about to be returned, the United States brought a civil forfeiture proceeding under the National Stolen Property Act , 18 U.S.C. § 2311 *et seq.*, on the ground that the painting was taken from victims of the Holocaust during World War II. The District Court refused to dismiss the case, and the litigation is pending. Thus a criminal statute was deemed to support a civil cause of action.

The pursuit of Holocaust-era claims is a relatively recent phenomenon. *See* Michael L. Bazyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. Rich. L. Rev. 1, 19 (2000), which said that October 1996, when a class action was filed against three Swiss banks, was "the start of the new era of Holocaust-claim litigation." The article goes on to say:

> The filing of such lawsuits only now–over one-half century after the events took place–is astounding. In the history of American litigation, a class of cases has never appeared in which so much time had passed between the wrongful act and the filing of a lawsuit. In contrast to the recent flood of lawsuits, only ten suits were filed in American courts from 1945 to 1995 stemming from damages suffered during the Holocaust era. The filing of such suits at the close of the twentieth century presents the last opportunity for the elderly survivors of the Holocaust to have their grievances heard in a court of law. Since the Holocaust took place in Europe, courts in European countries may appear on first blush to

> be the logical choice for such Holocaust-era suits. However, as with almost all transnational litigation, the highly-developed and expansive system of justice in this country suggests that the United States remains the best forum for the disposition of such claims. It is a tribute to the U.S. system of justice that our courts can handle claims that originated over fifty years ago in another part of the world. Long established principles of judicial jurisdiction, choice of law, equity, our independent judiciary, the American system of jury trials, and American-style discovery, make the United States the most attractive (and, in most cases, the only) forum in the world where Holocaust-era claims can be heard today.
> 34 U. Rich. L. Rev. at 7-9 (footnotes omitted).

The literature on this subject is large. *See generally* Michael L. Bazyler, *Holocaust Justice: The Battle for Restitution in America's Courts* (2003), ch. 5; Walter V. Robinson, *An Ignominious Legacy: Evidence Grows of Plundered Art in U.S.*, Boston Globe, Apr. 5, 1997, at Al ("growing evidence that the vibrant US market contains a greater number of plundered art works from World War II than anyone had suspected."), *quoting* Elisabeth des Portes, Secretary General of the International Council of Museums: "the art market is the only sector of economic life in which one runs a 90 percent risk of receiving stolen goods;" Wissbroecker, *Six Klimts, A Picasso & A Schiele: Recent Litigation Attempts to Recover Nazi Stolen Art*, 14 DePaul-LCA J. Art & Ent. Law & Policy 399 (2004); Yonover, *The "Last Prisoners of War": Unrestituted Nazi-Looted Art*, 6 J.L. & Soc. Challenges 81 (2004)(concluding that U.S. courts tend to favor restitution); Stephanie Cuba, *Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi Looted*

*Art*, 17 Cardozo Arts & Ent. L.J. 447, 471 (1999); Kaye, *Looted Art: What Can and Should be Done*, 20 Cardozo L. Rev. 657 (1998); McFarland-Taylor, *Tracking Stolen Artworks on the Internet: A New Standard for Due Diligence*, 16 J. Marshall J. Computer & Info. L. 937 (1998)(need for a uniform standard of due diligence, because courts apply different standards).

This Court should recognize this truly astonishing phenomenon and it should provide guidance to the Nation's courts as to how these difficult but absolutely essential cases can be uniformly, fairly and equitably adjudicated. It is a moral imperative for our Nation.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
August 16, 2007

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**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MAY 18, 2007**

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

No. 05-55364

ANDREW J. ORKIN; F. MARK ORKIN; SARAH-ROSE JOSEPHA ADLER; A. HEINRICH ZILLE,

*Plaintiffs-Appellants,*

*v.*

ELIZABETH TAYLOR,

*Defendant-Appellee.*

Argued and Submitted Feb. 12, 2007
Filed May 18, 2007

Before: WILLIAM C. CANBY, JR. and SIDNEY R. THOMAS, Circuit Judges, and SUZANNE B. CONLON,* District Judge.

THOMAS, Circuit Judge.

Descendants of Jewish art collector Margarete Mauthner (collectively, "the Orkins") claim that their ancestor was

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* The Honorable Suzanne B. Conlon, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

wrongfully dispossessed of a painting during Hitler's Nazi regime, entitling them to ownership of the painting, which was later purchased by actress Elizabeth Taylor. In this appeal, we conclude that the Holocaust Victims Redress Act does not create a private right of action and that the Orkins' state law claims are barred by the statute of limitations. We affirm the judgment of the district court, dismissing the complaint.

## I

Vincent van Gogh is said to have reflected that "paintings have a life of their own that derives from the painter's soul." The confused and perhaps turbulent history of his painting *Vue de l'Asile et de la Chapelle de Saint-Rémy* may prove the truth of his observation.

In 1889, a few months after cutting off the lower part of his left ear following a dispute with Paul Gauguin, van Gogh entered the Saint-Paul-de-Mausole asylum near the town of Saint-Rémy-de-Provence. During this period of his life, he produced over 150 paintings, including some of his most famous works, such as *The Starry Night.* In the summer or fall of 1889, he painted *Vue de l'Asile et de la Chapelle de Saint-Rémy*, which may have been part of a series that he described to his brother Theo as "Sketches of Autumn." The painting portrays either the Church of Labbeville near the town Auvers, a few miles from the asylum, or a monastery that was part of the asylum. Within a year of completing the painting, van Gogh died from a self-inflicted gunshot wound.

## *Appendix A*

Van Gogh sold only one painting during his lifetime. Since his death, however, his works have indeed had lives of their own. After Vincent's death in 1890, and his brother Theo's death six months later, ownership of *Vue de l'Asile et de la Chapelle de Saint-Rémy* passed to Theo's widow, Johanna. The German art dealer Paul Cassirer, an early promoter of the works of van Gogh and other post-impressionist artists, purchased the painting in 1906 or 1907. Shortly thereafter, Cassirer sold the picture to Margarete Mauthner, an early collector of van Gogh's works. The parties vigorously dispute the circumstances under which Mauthner parted with the painting, and that dispute forms the basis of the current controversy between the parties. We need not, and we do not, resolve those factual disputes in this appeal because the issues before us are purely legal in nature. However, a description of the general factual background of the case-highlighting where appropriate the factual disputes-is helpful to frame the legal issues presented.

One of the tools used by art historians to trace ownership is an artist's *catalogue raisonné*. A *catalogue raisonné* is an annotated, illustrated book of a particular artist's works, usually prepared by art historians, scholars, and dealers, which constitutes "a definitive listing and accounting of the works of an artist." *DeWeerth v. Baldinger*, 836 F.2d 103, 112 (2d. Cir. 1987). A *catalogue raisonné* published in 1928, *L'oeuvre de Vincent Van Gogh Catalogue Raisonné*, shows Margarete Mauthner as the owner of the painting. J.B. de la Faille's *catalogue raisonné* of van Gogh, published in 1939, also identifies Mauthner as the owner.

*Appendix A*

From the time of Adolf Hitler's election as Chancellor of Germany in 1933 until the end of World War II, Hitler's Nazi regime engaged in a systematic effort to confiscate thousands of works of art throughout Europe. Hector Feliciano, *The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest Works of Art* 3 (Basic Books 1997). Within Germany, the enactment of the Ordinance for the Attachment of the Property of the People's and State's Enemies and the Ordinance for the Employment of Jewish Property gave Nazi officials the authority to seize artwork from Jewish owners under color of law. Jonathan Petropoulos, *Art as Politics in the Third Reich* 190 (University of North Carolina Press 1996).

As the Nazis' persecution accelerated, Mauthner fled Germany to South Africa in 1939, leaving her possessions behind. She remained there until her death in 1947, at the age of 84. What happened to *Vue de l'Asile et de la Chapelle de Saint-Rémy* during that time is not clear from the record. A 1970 *catalogue raisonné* prepared by a committee of scholars in the Netherlands lists the next owner as Alfred Wolf, a Jewish businessman who left Germany for Switzerland in 1934 and ultimately relocated to South America. The auction catalogue prepared by Sotheby & Co. in 1963 lists the provenance, or chain of title, as including three owners prior to Wolf. The Sotheby's catalogue traces the ownership of the painting from Mauthner to Paul Cassirer, to Marcel Goldschmidt, and then to Alfred Wolf. The Orkins contend that this chain of ownership cannot be correct because Paul Cassirer had committed suicide in 1926, two years before the 1928 *catalogue raisonné* was published, listing Mauthner as the owner.

*Appendix A*

Notably, the Orkins do not contend that the painting was confiscated by the Nazis. Rather, they allege economic coercion, contending that Mauthner sold the painting "under duress." They note that laws promulgated by the Allied Forces after the conclusion of World War II established a presumption that any transfer or relinquishment of property by a persecuted person within the period January 30, 1933 to May 8, 1945 was an act of confiscation. Military Government Law No. 59 § 375(b).

Taylor contends that, at best, the record shows that the painting was sold through two Jewish art dealers to a Jewish art collector, with no evidence of any Nazi coercion or participation in the transactions.

In short, the parties agree that Mauthner once owned the painting and that it was later possessed by Alfred Wolf. At this point in the development of the case, the rest of what transpired with the painting during the 1930s in Berlin is clouded in uncertainty. Sometime in the early 1960s, the Estate of Alfred Wolf commissioned Sotheby's to sell by auction a number of Impressionist and Post-Impressionist paintings, including *Vue de l'Asile et de la Chapelle de Saint-Rémy.*

With the help of her father, who was an art dealer, Elizabeth Taylor began collecting art in the 1950s, acquiring works of Degas, Renoir, Pissarro, Monet, Cassatt and other prominent artists. She had long wanted to acquire a van Gogh. While living in London with her husband, Richard Burton, Taylor learned that *Vue de l'Asile et de la Chapelle de Saint-Rémy* would be offered at a Sotheby's auction in April 1963.

She authorized her father to bid for her at the auction, and he was successful in purchasing the painting on her behalf for £ 92,000.

Taylor's acquisition was publicized at the time. Subsequently, the 1970 *catalogue raisonné* referenced Taylor's ownership. From November 1986 until March 1987, the painting was exhibited publicly at the Metropolitan Museum of Art in New York, in an exhibition entitled *Van Gogh in Saint Rémy and Auvers.*

In 1990, Taylor offered the painting for sale through Christie's auction house in London. The provenance for the sale lists Taylor as the current owner, with the prior owners being Alfred Wolf (of Stuttgart and Buenos Aires), Marcel Goldschmidt & Co. (of Frankfurt), Margarete Mauthner (of Berlin), Paul Cassirer (of Berlin), and Johanna van Gogh-Bonger (of Amsterdam). The work did not sell at the auction.

In 1998, Congress enacted three statutes pertaining to victims of Nazi persecution: the Holocaust Victims Redress Act ("Act"), Pub.L. No. 105-158, 112 Stat. 15 (1998), the Nazi War Crimes Disclosure Act of 1998, Pub.L. No. 105-167, 114 Stat. 2865 (1998), and the United States Holocaust Assets Commission Act of 1998, Pub.L. No. 105-186, 112 Stat. 611 (1998). The Orkins allege that their inquiry into whether their ancestor, Mauthner, may have lost her art collection due to Nazi persecution began upon the passage of these acts. They retained a law firm in 2001 and claim that, until their attorneys completed their investigation, they did not discover the basis of their current claim. The Orkins allege that, before they began that investigation, they did not

know that Mauthner had owned *Vue de l'Asile et de la Chapelle de Saint-Rémy*, that she had lost the painting as a result of Nazi persecution, that Taylor had bought the painting, or that there was a legal basis for recovering the painting. They also claim that they first learned of Taylor's ownership in 2002, through a rumor on the internet that Taylor was interested in selling the painting.

In December 2003, the Orkins wrote a letter to Taylor, demanding that she return the painting to them. After some discussion of settlement, Taylor wrote a response letter declining settlement and asserting that the Orkins' claim to the painting was untimely. Taylor then filed a complaint for declaratory relief to establish her title.

In 2005, the Orkins filed their First Amended Complaint for recovery of the painting under theories of specific recovery, replevin, constructive trust, restitution, and conversion. The district court dismissed the complaint, concluding that the state-law actions were time-barred and that the federal statute did not create a private right of action. Because there is complete diversity between the parties and because the painting is worth more than $75,000, the district court had jurisdiction under 28 U.S.C. § 1332. We have jurisdiction under 28 U.S.C. § 1291, and we review *de novo* the district court's dismissal of the complaint pursuant to Rule 12(b)(6). *Cervantes v. United States*, 330 F.3d 1186, 1187 (9th Cir.2003).

Because the district court dismissed this case on a Rule 12(b)(6) motion, we must assume that all facts stated in the complaint are true and that they are provable by admissible

evidence. Although the parties vigorously dispute whether the painting was effectively confiscated by the Nazis through forced sale or was legitimately sold through Jewish art dealers, we need not resolve that issue. We assume, for the purposes of our discussion, that the allegations of the complaint are true and that Mauthner was coerced into giving up the painting before she left Germany.

II

The district court properly dismissed the Orkins' federal claims on the ground that the Holocaust Victims Redress Act did not create a private right of action against private art owners. In determining whether a federal statute creates a private right of action, congressional intent is the cornerstone of the analysis. The Supreme Court has established a four-factor test for discerning whether a statute creates a private right of action. *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). Under that test, we must ask: (1) whether the plaintiff is a member of a class that the statute especially intended to benefit, (2) whether the legislature explicitly or implicitly intended to create a private cause of action, (3) whether the general purpose of the statutory scheme would be served by creation of a private right of action, and (4) whether the cause of action is traditionally relegated to state law such that implication of a federal remedy would be inappropriate. 422 U.S. at 78, 95 S.Ct. 2080.

The most important inquiry under *Cort* is the second factor: whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one." *Opera Plaza Residential Parcel Homeowners Assn. v.*

*Hoang*, 376 F.3d 831, 834-35 (9th Cir.2004) (quoting *Cort*, 422 U.S. at 78, 95 S.Ct. 2080); *First Pacific Bancorp, Inc. v. Helfer*, 224 F.3d 1117, 1121-22 (9th Cir.2000) (same). Indeed, the three *Cort* questions that are not explicitly focused on legislative intent are actually indicia of legislative intent, such that the *Cort* test itself is focused entirely on intent. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979). The four *Cort* factors, thus, are merely targeted inquiries to guide our central project of discerning Congress's intent. *Id.*

The plain text of the Holocaust Victims Redress Act leaves little doubt that Congress did not intend to create a private right of action. The Orkins rely on § 202 of the Act, entitled "Sense of the Congress Regarding Restitution of Private Property, Such as Works of Art." That section reads in its entirety as follows:

> It is the sense of the Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.

Act § 202, 112 Stat. at 17-18.

"Sense of the Congress" provisions are precatory provisions, which do not in themselves create individual rights or, for that matter, any enforceable law. *Yang v. Cal.*

*Dept. of Soc. Servs.*, 183 F.3d 953, 958-59 (9th Cir.1999). Although "sense of the Congress" provisions are sometimes relevant to our determination of whether other mandatory provisions create private rights of action, *id.* at 959 & n. 4, the Orkins can point to no provision of the Act or of any of its companion legislation that can fairly be characterized as mandatory. There is simply no "right- or duty-creating language" anywhere in the statutory scheme, *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 n. 13, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), and § 202's announcement of a "sense of the Congress" cannot, of its own force, imply a private right of action, *Yang*, 183 F.3d at 958-59.

Additionally, the Act's legislative history indicates that even its most ardent supporter did not intend for the bill to create a private right of action. Rather, the legislative intent was to encourage state and foreign governments to enforce existing rights for the protection of Holocaust victims. The sponsor and primary champion of the legislation, Representative Jim Leach (R-IA), believed that existing law would suffice to restitute Nazi-stolen artworks to their Nazi-era owners. At a hearing that occurred after passage of the Act, Representative Leach noted the possibility that new "domestic legislation" might assist in restitution of stolen art, but he went on to conclude that "Congress may have gone as far as it appropriately should on this subject in the Holocaust Victims Redress Act." *Holocaust Victims' Claims, Hearing before the House Committee on Banking and Financial Services*, 105th Cong., 2d Sess. (1998). That statement strongly implies, consistently with the precatory language of the legislation itself, that the Act was a limited bill, passed with an understanding of constitutional

limitations on congressional power. The second *Cort* factor, thus, does not support the Orkins' claim; the bill simply did not intend to create a private right of action.

Examination of the remaining *Cort* factors buttresses this conclusion. With respect to the first *Cort* factor, although there is no doubt that the Act was focused on Holocaust victims and (in a colloquial sense) intended to benefit them, Holocaust victims do not constitute a "beneficiary class" within the meaning of the *Cort* test. The provision's focus is on "governments" rather than individuals, urging those governments "to facilitate" enforcement of preexisting property rights. Act § 202, 112 Stat. at 17-18. The statute, thus, does not "explicitly confer[ ] a benefit on" Holocaust victims; it merely expresses Congress's sense that Holocaust survivors and heirs should benefit fully from preexisting protections. *Cf. Cannon*, 441 U.S. at 693-94, 99 S.Ct. 1946 (concluding that the first *Cort* factor was met because the statute at issue "explicitly confers a benefit on" an identifiable class and because the plaintiff was a member of that class). The Orkins, thus, are not members of a class that Congress "intended to benefit," as that phrase is used in *Cort*.

With respect to the third *Cort* factor, the text and history of the legislation reveal that its overarching purpose was not to provide for private litigation. Rather, the general purpose of the statutory scheme was to fund research efforts and to declassify records, while simultaneously encouraging foreign governments, as well as public and private institutions, to do likewise. In other words, the motivating concern was *not* access to courts; it was access to information. In fact, throughout the committee hearings, witnesses testified that

courts would likely do a poor job of resolving Holocaust victims' claims. Specifically, the committee heard testimony that the difficulties of tracing information would likely preclude effective judicial resolution of discrete claims, and several museum directors testified that alternative fora such as mediation and arbitration were preferable to litigation. *Holocaust Victims' Claims, Hearing before the House Committee on Banking and Financial Services*, 105th Cong., 2d Sess. (1998) (testimony of Philippe de Montebello, director of the Metropolitan Museum of Art). The general purposes of the statute, therefore, do not support the conclusion that Congress intended to provide a private right of action in this case.

Finally, with respect to the fourth *Cort* factor, there can be no doubt-as this case amply demonstrates-that state law provides causes of action for restitution of stolen artworks. Furthermore, the torts asserted here are undoubtedly causes of action that are traditionally relegated to state law. Implication of a federal remedy in this case, therefore, would be inappropriate under the fourth *Cort* factor. Representative Leach's statement that "Congress may have gone as far as it appropriately should" when it passed the Act strongly supports the conclusion that Congress did not intend to supersede traditional state-law remedies when it passed the Act. *Holocaust Victims' Claims, Hearing before the House Committee on Banking and Financial Services*, 105th Cong., 2d Sess. (1998).

In short, the Act does not satisfy any of the *Cort* factors; none of the relevant indicia of intent supports the conclusion that Congress intended to create an implied private right of

action in this case. The Act is a precatory announcement of the "sense of the Congress," which neither confers rights nor creates duties. Given the absence of congressional intent to create a private right of action, the Orkins' assertion of a federal right of action must fail.

III

The district court also properly concluded that the Orkins' state-law claims were time-barred. California provides a three-year statute of limitations for any action arising from the "taking, detaining, or injuring" of any "goods or chattels." Cal.Civ.Proc.Code § 338(c). In 1983, the statute of limitations was amended to specify that a "discovery rule" governs accrual of causes of action for recovery of "any article of historical, interpretive, scientific, or artistic significance." *Id.* In other words, under the new law, an action for recovery of artwork accrues when the rightful owner discovers the whereabouts of the artwork. Before 1983, the statute did not specify when a cause of action for theft would accrue.

The Orkins do not argue that the 1983 amendment applies retroactively to their allegations of a 1939 theft and a 1963 conversion. Rather, they contend that the discovery rule applies even under pre-1983 law, citing an intermediate appeals court decision that so held. *Naftzger v. Am. Numismatic Soc'y*, 42 Cal.App.4th 421, 49 Cal.Rptr.2d 784 (1996).

"The task of a federal court in a diversity action is to approximate state law as closely as possible in order to make

sure that the vindication of the state right is without discrimination because of the federal forum." *Ticknor v. Choice Hotels Intern., Inc.*, 265 F.3d 931, 939 (9th Cir.2001) (quoting *Gee v. Tenneco, Inc.*, 615 F.2d 857, 861 (9th Cir.1980)). If the state's highest appellate court has not decided the question presented, then we must predict how the state's highest court would decide the question. *Id.* In doing so, we take state law as it exists without speculating as to future changes in the law. *Id.*

The California Supreme Court has never confronted the question of what rule governs accrual of pre-1983 causes of action for theft and conversion. The California Supreme Court has, however, specifically held that the discovery rule, whenever it applies, incorporates the principle of constructive notice. In *Jolly v. Eli Lilly & Co.*, the California Supreme Court held that, under California's discovery rule, "[a] plaintiff is held to her actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to her." 44 Cal.3d 1103, 1109, 245 Cal.Rptr. 658, 751 P.2d 923 (1988). In other words, under the discovery rule, a cause of action accrues when the plaintiff discovered *or reasonably could have discovered* her claim to and the whereabouts of her property. In assessing California law, we conclude that it is highly unlikely that the California Supreme Court would abandon the *Jolly* rule, much less adopt a new rule that eschewed the concept of constructive notice.

Under *Jolly*, the latest possible accrual date of the Orkins' cause of action was the date on which they first reasonably could have discovered, through investigation of sources open to them, their claim to and the whereabouts of the van Gogh

painting. From the face of the Orkins' complaint, it is apparent that Taylor's acquisition of the painting was certainly discoverable at least by 1990, when she held it out for sale in an international auction, and most probably as early as 1963, when she acquired the painting in a highly publicized international auction. In fact, the complaint alleges-and demonstrates by attachment-that Taylor bought the painting at a publicized auction in 1963, that Taylor was listed as the owner of the painting in a publicly available 1970 *catalogue raisonné*, and that Taylor publicly offered the painting for sale in 1990. Had the Orkins investigated any of those publicly-available sources, they could have discovered both their claim to the painting and the painting's whereabouts long before the 2002 internet rumor was posted.

We therefore affirm the district court's conclusion that the Orkins' state-law claims are time-barred. Even under the most generous possible rule for accrual of the causes of action, the claims expired in or before 1993-three years after the last public announcement of Taylor's ownership. The district court correctly held that the Orkins' state law claims were untimely filed.

IV

Congress did not create a private right of action in passing the Holocaust Victims Redress Act, which merely reflected the sense of Congress. The Orkins' state law claims are time-barred. The district court was entirely correct in dismissing the complaint. We need not, and do not, reach any of the other issues urged by the parties.

**AFFIRMED.**

## APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED FEBRUARY 2, 2005

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

No. CV 04-8472-RGK(FMOX)

SARAH-ROSE JOSEPHA ADLER, *et al.*

v.

ELIZABETH TAYLOR

February 2, 2005

**CIVIL MINUTES-GENERAL**

Present: The Honorable
R. GARY KLAUSNER, U.S. DISTRICT JUDGE

**Proceedings: (IN CHAMBERS)**
**DEFENDANT ELIZABETH TAYLOR'S MOTION TO DISMISS (DE 5)**

### I. INTRODUCTION

The issue in this case is the rightful ownership to "Vue de l'Asile et de la Chapelle de Saint-Remy," ("the painting") which Vincent Van Gogh painted while a patient of the asylum at Saint-Remy. Plaintiffs are heirs and descendants of an art collector who owned the painting in early twentieth-century Germany. In 1963, Elizabeth Taylor ("Taylor")

bought the painting at an auction in England. Plaintiffs are essentially suing for four claims: replevin, constructive trust, restitution, and conversion. Plaintiffs complicate matters by bringing these four claims in four alternate forms: (1) generally, for "recovery of the painting" under an action implied by federal law; (2) for these four claims individually under an action implied by federal law; (3) for these four claims as implied by the "findings and declarations of the California legislature"; and (4) for these four claims in their traditional form, under California law. Essentially, Plaintiffs argue that the painting rightfully belongs to them because it was stolen from their heir through Nazi persecution. Taylor moves to dismiss for failure to state a claim. For the following reasons, the Court grants Taylor's motion.

For the purposes of this Motion, the Court must consider all facts alleged in the First Amended Complaint to be true. Plaintiffs' are descendants and heirs of the late Margarete Mauthner, who bought the painting in 1914 in Germany. Mauthner owned the painting through the 1920s and 1930s. Mauthner and her family fled Nazi Germany for South Africa in 1939. The painting was lost to Nazi persecution. Mauthner died in South Africa in 1947. She was eighty-four.

Taylor bought the painting in 1963 at a Sotheby's auction. The Sotheby's auction incorrectly stated that the painting had passed to Paul Cassirer in 1928 (he had died in 1926). The Sotheby's auction also referred bidders to two catalogues raisonné, which listed the history of the painting. This history of ownership identified Mauthner as the owner of the painting in the 1920s and 1930s, and included that she lived in Berlin. It included other information inconsistent with the Sotheyby's

auction's representations. Plaintiffs allege that Taylor ignored these warning signs and bought the painting without properly investigating its ownership history.

In the late 1990's and early in this decade, Congress and the California legislature both stated a strong public policy favoring the return of property that the Nazi government had stolen. Plaintiffs then became aware of the possibility that Mauthner owned the painting and that it may have been stolen from her. After some investigation, Plaintiffs brought the present action.

## II. JURISDICTION

### A. Diversity Jurisdiction

Diversity jurisdiction clearly exists in this case. Plaintiffs are all foreign citizens, while Defendant is a California resident. The painting is worth well over $75,000. Therefore, the Court properly has jurisdiction over the case pursuant to 28 U.S.C. § 1332.

### B. Federal Question Jurisdiction

Some of Plaintiffs' claims are purportedly brought under the 1998 Holocaust Victims Redress Act ("HVRA"), Pub.L. No. 105-158, 112 Stat. 15 (1998), and its companion Nazi War Crimes Disclosure Act ("Disclosure Act"), Pub.L. No. 105-567, 114 Stat. 2865 (1998). Plaintiffs ask the Court to find that these grant the Court federal question jurisdiction. Such a determination is unnecessary because the Court already has jurisdiction pursuant to § 1332. Therefore, the Court need not reach the question of whether federal question jurisdiction applies to this case.

*Appendix B*

## III. JUDICIAL STANDARD

In considering a motion to dismiss for failure to state a claim pursuant to Federal Rules of Civil Procedure 12(b)(6), the Court must assume the plaintiff's allegations are true, and must construe the complaint in a light most favorable to the plaintiff. *See United States v. City of Redwood City*, 640 F.2d 963, 967 (9th Cir.1981). The sole issue raised by such a motion is whether the facts pleaded would, if established, support a valid claim for relief. Thus, the facts alleged, no matter how improbable, must be accepted as true for purposes of the motion. *See Neitzke v. Williams*, 490 U.S. 319, 328-329, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). However, a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations. *See W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.1981). Upon review of a complaint, a court may not dismiss pursuant to Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Russell v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir.1980). However, dismissal is proper if a complaint is vague, conclusory, and fails to set forth any material facts in support of the allegation. *See North Star Int'l v. Ariz. Corps. Comm'n*, 720 F.2d 578, 583 (9th Cir.1983).

The court cannot consider material outside the complaint unless it converts the Rule 12(b)(6) motion into a summary judgment motion. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir.2001). For purposes of a

Rule 12(b)(6) motion, the court may consider material properly submitted with the complaint. *See Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 (9th Cir.1989). Furthermore, the court may also consider matters that may be judicially noticed pursuant to Federal Rule of Evidence 201. *Id.* at 1555.

If the court chooses to dismiss the complaint, it must decide whether to grant leave to amend. Courts grant leave to amend unless it is clear that amendment would be futile, and "that the deficiencies of the complaint could not be cured by amendment." *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir.1987).

## IV. DISCUSSION

### A. Plaintiffs' Traditional State Law Claims

Before reaching Plaintiffs' non-traditional claims (that arise out of federal law or out of the California legislature's findings and declarations), the Court will first determine whether the Complaint's traditional claims can survive the motion to dismiss. Taylor argues that these claims should be dismissed because they are time-barred under California. Plaintiffs argue that the discovery rule delayed the statute of limitations from running until recently. For the following reasons, the Court finds that Plaintiffs' Complaint establishes facts that show the statute of limitations began to run in 1963 and bars their claims.

*Appendix B*

**1. Plaintiffs' First Amended Complaint States a Prima Facie Case**

Plaintiffs allege traditional state law claims for conversion, replevin, constructive trust, and restitution. Essentially, Plaintiffs allege (1) that they, through their heir, are the rightful owner of the painting, (2) that the Nazi government's persecution resulted in their loss of the painting, and (3) that Taylor wrongfully took possession of the painting either knowing of its likely theft, or at least that she failed to reasonably investigate its possible theft.

Generally, Plaintiffs' state law claims are valid and supported by the Complaint. First, Plaintiffs can prove conversion by showing (1) that Plaintiffs have ownership or a right to possession of the painting; and (2) that Taylor wrongfully appropriated or exercised dominion over the painting. *See Dodge v. Meyer*, 61 Cal. 405, 406-07 (1882); *Oakdale Vill. Group v. Fong*, 43 Cal.App.4th 539, 540-41, 50 Cal.Rptr.2d 810 (1996). Here, Plaintiffs' alleged facts, if proven, would demonstrate that Plaintiffs' (through their heir) had rightful ownership to the painting, and that Taylor took exclusive control of the painting in 1963 either knowing that it was stolen or negligently failing to investigate its ownership history. Alternatively, Plaintiff's alleged facts could establish that they are the rightful owners and that Taylor, although she lawfully purchased the painting, is liable for conversion arising out of her refusal to return it. *See Edwards v. Jenkins*, 214 Cal. 713, 720, 7 P.2d 702 (1932). Plaintiffs' allegations sufficiently state a claim for conversion under California law.

Second, replevin is a common law remedy that permits the prevailing party to recover both personal property and incidental damages from an unlawful possessor. *See* 66 Am.Jur.2d Replevin § 1 (2004). In federal courts, replevin is a remedy specifically approved by rule, as governed by the appropriate state law. *See* Fed.R.Civ.P. 64; *Granny Goose Foods, Inc. v. B'hd of Teamsters and Auto Truck Drivers Local No. 70*, 415 U.S. 423, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974). In California, courts allow for specific recovery of personal property and incidental damages (but use the term "claim and delivery" rather than "replevin"). *See Fran-Well Heater Co. v. Robinson*, 182 Cal.App.2d 125, 5 Cal.Rptr. 900 (1960); Cal. Civ.Code § 3379; Cal.Code Civ. P. § 511.010 *et seq.* For specific recovery, Plaintiffs only need show (1) a right to possession of the property, and (2) Taylor's wrongful possession. *Id.* Stated more simply, specific recovery is an available remedy for conversion. Because the Complaint supports a conversion claim, it also supports a specific recovery remedy.

Third, a constructive trust is an equitable remedy used to compel a person holding property to transfer it to the person entitled to possession. *See* Cal. Civ.Code §§ 2223, 2224; *Haskel Engineering & Supply Co. v. Hartford Acc. & Indem. Co.*, 78 Cal.App.3d 371, 375, 144 Cal.Rptr. 189 (1978); B.E. Witkin, *Summary of California Law* § 305 (9th ed. 1990 & Supp.2004). For a court to create a constructive trust, the plaintiff only needs to show that (1) the defendant wrongfully acquired the property, and (2) that the defendant would be unjustly enriched if allowed to keep the property. *Id.* Again, for the same reasons discussed above, Plaintiffs' Complaint alleges facts that support both elements necessary for a constructive trust.

Finally, Plaintiffs allege a claim for restitution. However, in California, the restitution remedy is only applicable to breach of contract claims. *See Freedman v. St. Matthias Parish,* 37 Cal.2d 16, 230 P.2d 629 (1951). Here, Plaintiffs' "restitution" claim is better termed a demand for specific recovery and any incidental damages, which are already properly alleged in the preceding three claims.

In summary, regardless of whether Plaintiff's non-traditional claims are valid, at the very least their First Amended Complaint sufficiently alleges a claim for conversion, and demands valid remedies of specific recovery and a constructive trust.

**2. California's Statute of Limitations**

Taylor alleges that the Complaint does not state a claim because of California's statute of limitations. Plaintiffs argue that the statute did not begin tolling against them until recently.

California limits causes of action to recover Holocaust-era artwork from individuals. California passed a law giving heirs the right to sue *galleries and museums* for the return of such artwork until 2010, free from any statute of limitations. *See* Cal.Civ.Proc.Code § 354.3. However, this exception does not apply to suits against individuals. In "[a]n action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property," a plaintiff must sue within three years. Cal.Civ.Proc.Code § 338(c). A newer version of the California law includes an explicit "discovery rule," which states that the statute begins

to run when the plaintiff was on notice of the property's whereabouts. However, the older version of the California law did not include a "discovery rule." The parties dispute whether a discovery rule applies to this case, though both agree that the Court should apply the old law given that Taylor bought the painting in 1963.

**a. The Discovery Rule Does Not Apply to this Case**

In *Naftzger v. American Numismatic Society*, one California Court of Appeal held that there was an implied discovery rule in the old statute. 42 Cal.App.4th 421, 49 Cal.Rptr.2d 784 (1996). However, in *Society of California Pioneers v. Baker* another Court of Appeal disagreed. 43 Cal.App.4th 774, 783, 50 Cal.Rptr.2d 865 (1996). The California Supreme Court has not resolved the conflict.

As the *California Pioneers* Court notes, the *Naftzger* Court failed to address California precedent that rejected the application of a discovery rule. *California Pioneers*, 43 Cal.App.4th at 780-83, 50 Cal.Rptr.2d 865. This precedent establishes that the statute of limitations begins to run against a subsequent purchaser of stolen property at the time the subsequent purchaser obtains the property. *Id.* Thus, in this case, the statute of limitations began to run in 1963. It has long since expired.

**b. Application of the Discovery Rule**

Even if the California courts would apply a discovery rule to this case, Plaintiffs' Complaint does not state facts

sufficient to survive the motion to dismiss. "The discovery rule provides that, in an appropriate case, a cause of action will not accrue until the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action." *O'Keefe v. Snyder*, 83 N.J. 478, 491, 416 A.2d 862 (1980).

Plaintiffs' own Complaint establishes several key facts: (1) the world knew of Mauthner's prior ownership of the painting for years; (2) Mauthner was aware that the painting was lost or stolen; and (3) Taylor's purchase and ownership of the painting was common knowledge and easily discoverable. The facts establish that Plaintiffs, "by exercise of reasonable diligence," should have discovered Taylor's ownership in 1963. *O'Keefe*, 83 N.J. at 491, 416 A.2d 862. The Complaint fails to allege any diligence on Plaintiffs part, much less any reasonable diligence. Thus, even if the discovery rule applied to this case, Plaintiffs have still failed to state a claim.

Therefore, the Court dismisses Plaintiffs' claims, numbered nine through thirteen, for claims of conversion, replevin, constructive trust, and restitution, as barred by the California statute of limitations.

**3. English Law**

Taylor asserts that the California courts would apply 1963 English law to this case because the painting was bought in England. Under that law, Taylor claims that Plaintiffs' suit is time-barred.

The Court need not reach the merits of Taylor's choice-of-law argument at this time. Taylor relies on declaration evidence that may or may not be contested to establish what the result would be in this case under English law. However, a motion to dismiss for failure to state a claim is judged on the pleadings, not declarations such as Taylor has provided to the Court. Moreover, the California statute of limitations bars Plaintiffs' claims.

### B. Plaintiffs' Non-Traditional Causes of Action

Plaintiffs have stated several non-traditional causes of action. No court has ever found valid the causes of action that Plaintiffs claim in their Complaint. For the following reasons, the Court finds that Plaintiffs' non-traditional claims are invalid.

#### 1. Claims Arising Out of Federal Law

Federal courts are reluctant to create a new cause of action that Congress did not explicitly create through legislative action. *See United States v. Gilman*, 347 U.S. 507, 74 S.Ct. 695, 98 L.Ed. 898 (1954); *Wheeldin v. Wheeler*, 373 U.S. 647, 651, 83 S.Ct. 1441, 10 L.Ed.2d 605 (1963). The courts will only create a new cause of action where absolutely necessary in order to effectuate Congress's intent. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677, 688, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979); *J.I. Case Co. v. Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964).

The Supreme Court's methodology on how to best determine a Congressional intent to create a cause of action

has shifted over the past thirty years, with a trend against finding new causes of action. *See* Erwin Chemerinsky, *Federal Jurisdiction* § 6.3.3 (4th ed.2003). Under the older approach, the Supreme Court looked to four factors: whether the Plaintiff is a member of a class envisioned by Congress, whether there is any indication of Congressional intent, whether implying a cause of action is consistent with the overall statutory scheme, and whether the cause of action is one traditionally left to state law. *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975).

Under the current approach, the courts create a private right of action "only if there is affirmative evidence of Congress's intent to create a private right of action." Chemerinsky at 385 (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979)). The courts also presume that Congress is well aware of this philosophy of judicial restraint, and therefore would clearly enunciate an intent to create a private right of action when that desire exists. *See Karahalios v. Nat'l Federation of Federal Employees*, 489 U.S. 527, 109 S.Ct. 1282, 103 L.Ed.2d 539 (1989).

Here, under any Supreme Court methodology, the Congressional Record does not indicate an intent to create a private cause of action. Rather, it indicates a Congressional intent to encourage governments to aid in the restitution of property through currently existing laws. Plaintiffs completely fail to address the fourth Cort factor. This factor makes it clear that courts should not create a new federal law where a state law already exists. Here, California law already provides for conversion and specific recovery.

Therefore, the Court finds that Plaintiffs claims, numbered one through five, for causes of action arising out of federal law, are invalid and are dismissed.

### 2. Claims Arising Out of the California Legislature's Findings and Declarations

Plaintiffs also ask the Court to create a new California claim that arises out of the California legislatures findings and declarations. No California court has created a special claim for the conversion of property in the manner proposed by Plaintiffs. As a federal court of limited jurisdiction, this Court is particularly reluctant to create a new California state cause of action, particularly one that would contradict the established California statute of limitations.

Therefore, the Court dismisses Plaintiffs' claims, numbered six through nine, for causes of action arising out of the findings and declarations of the California legislature.

## V. CONCLUSION

In light of the foregoing, Taylor's motion to dismiss is granted in its entirety.

**IT IS SO ORDERED.**

## APPENDIX C — HOLOCAUST VICTIMS REDRESS ACT

PL 105-158, February 13, 1998, 112 Stat 15

HOLOCAUST VICTIMS REDRESS ACT

TITLE II—WORKS OF ART

Sec. 201. FINDINGS.

Congress finds as follows:

(1) Established pre-World War II principles of international law, as enunciated in Articles 47 and 56 of the Regulations annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, prohibited pillage and the seizure of works of art.

(2) In the years since World War II, international sanctions against confiscation of works of art have been amplified through such conventions as the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which forbids the illegal export of art work and calls for its earliest possible restitution to its rightful owner.

(3) In defiance of the 1907 Hague Convention, the Nazis extorted and looted art from individuals and institutions in countries it occupied during World War II and used such booty to help finance their war of aggression.

(4) The Nazis' policy of looting art was a critical element and incentive in their campaign of genocide against

individuals of Jewish and other religious and cultural heritage and, in this context, the Holocaust, while standing as a civil war against defined individuals and civilized values, must be considered a fundamental aspect of the world war unleashed on the continent.

(5) Hence, the same international legal principles applied among states should be applied to art and other assets stolen from victims of the Holocaust.

(6) In the aftermath of the war, art and other assets were transferred from territory previously controlled by the Nazis to the Union of Soviet Socialist Republics, much of which has not been returned to rightful owners.

Sec. 202. SENSE OF THE CONGRESS REGARDING RESTITUTION OF PRIVATE PROPERTY, SUCH AS WORKS OF ART.

It is the sense of the Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.

*Appendix C*

U.S. HOLOCAUST ASSETS COMMISSION ACT OF 1998

An Act to establish a commission to examine issues pertaining to the disposition of Holocaust-era assets in the United States before, during, and after World War II, and to make recommendations to the President on further action, and for other purposes.

(a) ESTABLISHMENT.—There is established a Presidential Commission, to be known as the "Presidential Advisory Commission on Holocaust Assets in the United States" (hereafter in this Act referred to as the "Commission').

SEC. 3. DUTIES OF THE COMMISSION.

(a) ORIGINAL RESEARCH.—

(1) IN GENERAL.—Except as otherwise provided in paragraph (3), the Commission shall conduct a thorough study and develop a historical record of the collection and disposition of the assets described in paragraph (2), if such assets came into the possession or control of the Federal Government, including the Board of Governors of the Federal Reserve System and any Federal reserve bank, at any time after January 30, 1933—

(A) after having been obtained from victims of the Holocaust by, on behalf of, or under authority of a government referred to in subsection (c);

(B) because such assets were left unclaimed as the result of actions taken by, on behalf of, or under authority of a government referred to in subsection (c); or

(C) in the case of assets consisting of gold bullion, monetary gold, or similar assets, after such assets had been obtained by the Nazi government of Germany from governmental institutions in any area occupied by the military forces of the Nazi government of Germany.

(2) TYPES OF ASSETS.—Assets described in this paragraph include—

. . .

(G) works of art; and

(H) books, manuscripts, and religious objects.

* * *

(3) COORDINATION OF ACTIVITIES.—In carrying out its duties under paragraph (1), the Commission shall, to the maximum extent practicable, coordinate its activities with, and not duplicate similar activities already being undertaken by, private individuals, private entities, or government entities, whether domestic or foreign.

* * *

SEC. 9. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated not more than $3,500,000, in total, for the interagency funding of activities of the Commission under this Act for fiscal years 1998, 1999, and 2000, of which, notwithstanding section 1346 of title

*Appendix C*

31, United States Code, and section 611 of the Treasury and General Government Appropriations Act, 1998, $537,000 shall be made available in equal amounts from funds made available for fiscal year 1998 to the Departments of Justice, State, and the Army that are otherwise unobligated. Funds made available to the Commission pursuant to this section shall remain available for obligation until December 31, 1999.

NAZI WAR CRIMES DISCLOSURE ACT

. . .

SEC. 3. REQUIREMENT OF DISCLOSURE OF RECORDS REGARDING PERSONS WHO COMMITTED NAZI WAR CRIMES.

* * *

(a) NAZI WAR CRIMINAL RECORDS.—For purposes of this Act, the term "Nazi war criminal records" means classified records or portions of records that—

(1) pertain to any person with respect to whom the United States Government, in its sole discretion, has grounds to believe ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—

*Appendix C*

(A) the Nazi government of Germany;

(B) any government in any area occupied by the military forces of the Nazi government of Germany;

(C) any government established with the assistance or cooperation of the Nazi government of Germany; or

(D) any government which was an ally of the Nazi government of Germany; or

(2) pertain to any transaction as to which the United States Government, in its sole discretion, has grounds to believe—

(A) involved assets taken from persecuted persons during the period beginning on March 23, 1933, and ending on May 8, 1945, by, under the direction of, on behalf of, or under authority granted by the Nazi government of Germany or any nation then allied with that government; and

(B) such transaction was completed without the assent of the owners of those assets or their heirs or assigns or other legitimate representatives.

(b) RELEASE OF RECORDS.—

(1) IN GENERAL.—Subject to paragraphs (2), (3), and (4), the Nazi War Criminal Records Interagency Working Group shall release in their entirety Nazi war criminal records that are described in subsection (a).

*Appendix C*

SEC. 4. EXPEDITED PROCESSING OF FOIA REQUESTS FOR NAZI WAR CRIMINAL RECORDS.

(a) EXPEDITED PROCESSING.—For purposes of expedited processing under section 552(a)(6)(E) of title 5, United States Code, any requester of a Nazi war criminal record shall be deemed to have a compelling need for such record.

(b) REQUESTER.—For purposes of this section, the term "requester" means any person who was persecuted in the manner described under section 3(a)(1) of this Act who requests a Nazi war criminal record.

CALIFORNIA CIVIL PROCEDURE CODE 338(c)

335. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:

. . .

338. Within three years:

. . .

(c) An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property. The cause of action in the case of theft, as defined in Section 484 of the Penal Code, of any article of historical, interpretive, scientific, or artistic significance is not deemed to have accrued until the discovery of the

whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency that originally investigated the theft.

JANUARY 7, 2002

An act to add Section 354.3 to the Code of Civil Procedure, relating to limitation of actions.

LEGISLATIVE COUNSEL'S DIGEST

AB 1758, Nakano. Limitation of actions: Holocaust-era artwork.

Existing law authorizes actions for the taking, detaining, or injuring of any good or chattel, or for the specific recovery of personal property to be commenced within 3 years. Existing law authorizes actions for the theft of any article of historical, interpretive, scientific, or artistic significance to be commenced within 3 years of the discovery of the article by various entities, as defined.

This bill would authorize any owner, or heir or beneficiary of the owner, of Holocaust-era artwork, as defined, to bring an action in superior court to recover that artwork from any museum or gallery. This bill would provide that any action brought under these provisions may not be dismissed for failure to comply with the applicable statute of limitation, provided the action is commenced on or before December 31, 2010.

*Appendix C*

SECTION 1. The Legislature finds and declares the following:

(a) In addition to the many atrocities that befell the victims of the Nazi regime, treasured pieces of artwork were wrongfully taken.

(b) Thousands of victims of Nazi persecution, and the heirs of victims of Nazi persecution, are residents of the State of California. Many of these victims and descendants are investigating the whereabouts of artwork that rightfully belonged to their families.

(c) California has a moral and public policy interest in assuring that its residents and citizens are given a reasonable opportunity to commence an action in court for those pieces of artwork now located in museums and galleries.

(d) Museums are committed to resolving claims for Holocaust-era artwork in an amicable and timely manner, and to undertaking every effort to conduct thorough provenance research to identify artwork that may have been stolen during the Holocaust Era.

(e) Currently, an individual has three years, after discovering the whereabouts of the artwork, to commence an action in court.

(f) Due to the unique circumstances surrounding the theft of Holocaust-era artwork, commencement of an action requires detailed investigation in several countries, involving numerous historical documents and the input of experts.

(g) In order to obtain all necessary data, investigating a prospective action may take several years.

(h) The current three-year statute of limitation, after discovery of the whereabouts of the artwork, is an insufficient amount of time to finance, investigate, and commence an action.

(i) To the extent that the enactment of this act will extend the statute of limitation, that extension of the limitation period is intended to be applied retroactively, irrespective of whether the claims were barred by any applicable statute of limitation under any other provision of law prior to the enactment of this act.

SEC. 2. Section 354.3 is added to the Code of Civil Procedure, to read:

354.3. (a) The following definitions govern the construction of this section:

(1) "Entity" means any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance.

(2) "Holocaust-era artwork" means any article of artistic significance taken as a result of Nazi persecution during the period of 1929 to 1945, inclusive.

(b) Notwithstanding any other provision of law, any owner, or heir or beneficiary of an owner, of Holocaust-era artwork, may bring an action to recover Holocaust-era

artwork from any entity described in paragraph (1) of subdivision (a). Subject to Section 410.10, that action may be brought in a superior court of this state, which court shall have jurisdiction over that action until its completion or resolution. Section 361 does not apply to this section.

(c) Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010.

# APPENDIX D — LAW NO. 59 RESTITUTION OF IDENTIFIABLE PROPERTY

## MILITARY GOVERNMENT — GERMANY UNITED STATES AREA OF CONTROL

## LAW NO. 59

## RESTITUTION OF IDENTIFIABLE PROPERTY

### PART I

### GENERAL PROVISIONS

### ARTICLE 1

### Basic Principles

1. It shall be the purpose of this Law to effect to the largest extent possible the speedy restitution of identifiable property (tangible and intangible property and aggregates of tangible and intangible property) to persons who were wrongfully deprived of such property within the period from 30 January 1933 to 8 May 1945 for reasons of race, religion, nationality, ideology or political opposition to National Socialism. For the purpose of this Law deprivation of property for reasons of nationality shall not include measures which under recognized rules of international law are usually permissible against property of nationals of enemy countries.

2. Property shall be restored to its former owner or to his successor in interest in accordance with the provisions of this Law even though the interests of other persons who had no knowledge of the wrongful taking must be subordinated. Provisions of law for the protection of purchasers in good faith, which would defeat restitution, shall be disregarded except where this Law provides otherwise.

*Appendix D*

## ARTICLE 3

### Presumption of Confiscation

1. It shall be presumed in favor of any claimant that the following transactions entered into between 30 January 1933 and 8 May 1945 constitute acts of confiscation within the meaning of Article 2:

a) Any transfer of relinquishment of property made during a period of persecution by any person who was directly exposed to persecutory measures on any of the grounds set forth in Article 1;

b) Any transfer or relinquishment of property made by a person who belonged to a class of persons which on any of the grounds set forth in Article 1 was to be eliminated in its entirety from the cultural and economic life of Germany by measures taken by the State or the NSDAP.

2. In the absence of other factors proving an act of confiscation within the meaning of Article 2, the presumptions set forth in paragraph 1 may be rebutted by showing that the transferor was paid a fair purchase price. Such evidence by itself shall not, however, rebut the presumptions if the transferor was denied the free right of disposal of the purchase price on any of the grounds set forth in Article 1.

3. A fair purchase price within the meaning of this Article shall mean the amount of money which a willing buyer would pay and a willing seller would take, taking into

consideration, in the case of a commercial enterprise, the normal good will which such enterprise would have in the hands of a person not subject to persecutory measures referred to in Article 1.

## ARTICLE 4

### Power of Avoidance

1. Any transaction entered into by a person belonging to a class referred to in Paragraph 1 b) of Article 3 within the period from 15 September 1935 (the date of the first Nuremberg laws) to 8 May 1945 may, because of the duress imposed on such class, be avoided by a claimant where such transaction involved the transfer or relinquishment of any property unless:

a) The transaction as such and with its essential terms would have taken place even in the absence of National Socialism, or

b) The transferee protected the property interests of the claimant (Article 7) or his predecessor in interest in an unusual manner and with substantial success, for example, by helping him in transferring his assets abroad or through similar assistance.

2. In determining under paragraph 1 a) whether the transaction would have taken place even in the absence of National Socialism, the fact that

the transferor himself offered to sell the property to the transferee, or

the transferor received a fair purchase price (see Article 3, paragraph 3) the free right of disposal of which was not denied him on any of the grounds set forth in Article 1,

shall be considered by the Restitution Authority together with all other facts, but neither fact, either singly or in conjunction with the other, shall be sufficient to show that the transaction would have taken place even in the absence of National Socialism.

3. Similarly neither of these facts, either singly or in conjunction with the other, shall be sufficient to show that the claimant is estopped from exercising the power of avoidance by reason of his own previous conduct or that of his predecessor in interest.

4. The term "claim for restitution" as used in this Law shall be deemed to include all claims based on the right to exercise the power of avoidance. The exercise of the power of avoidance shall have the effect that the property transferred or relinquished pursuant to the voided transaction shall for the purposes of this Law be deemed to be confiscated property.

5. The filing of a claim for restitution shall, whether or not it is specifically stated, be deemed to be an exercise of the right of avoidance on behalf of the person entitled to exercise such right.

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## ARTICLE 14

### Persons Liable to Make Restitution

The person liable to make restitution (hereinafter referred to as restitutor), within the meaning of this Law, is the present possessor of confiscated tangible property or the present holder of a confiscated intangible interest, or of an aggregate of tangible and intangible property.

## ARTICLE 19

### Protection of Ordinary and Usual Business Transactions

Except as provided in Articles 20 and 21, tangible personal property shall not be subject to restitution if the present owner or his predecessor in interest acquired it in the course of an ordinary and usual business transaction in an establishment normally dealing in that type of property. However, the provisions of this Article shall not apply to religious objects or to property which has been acquired from private ownership if such property is an object of unusual artistic, scientific, or sentimental personal value, or was acquired at an auction, or at a private sale in an establishment engaged to a considerable extent in the business of disposing of confiscated property.

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No. 07-216

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IN THE

# Supreme Court of the United States

ANDREW J. ORKIN, F. MARK ORKIN
and SARAH-ROSE JOSEPHA ADLER,

*Petitioners*,

v.

ELIZABETH TAYLOR,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## BRIEF IN OPPOSITION

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether a "Sense of Congress" provision included in the Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15 (1998), creates a private right of action for restitution of art allegedly confiscated by the Nazis.

2. Whether a hearing must be held on an affirmative state statute-of-limitations defense prior to dismissal of a complaint pursuant to Fed. R. Civ. P. 12(b)(6), where the allegations of the complaint demonstrate on their face that the claims are untimely.

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## STATEMENT OF THE CASE

Although the subject matter of this case is intriguing, the background relevant to the decision of the Court of Appeals is straightforward. The painting at issue was purchased by Margarete Mauthner in the early 1900s. Pet. App. 3a. While the parties dispute the circumstances under which Mauthner lost possession of the painting, as well as some aspects of the subsequent chain of ownership, they agree that the painting was later acquired by a German-Jewish businessman named Alfred Wolf. *Id.* 3a-5a. Wolf's estate commissioned Sotheby's to sell the painting, and it was purchased for respondent Elizabeth Taylor at a public auction in 1963. *Id.* 5a-6a. A 1970 *catalogue raisonné*[1] noted Taylor's ownership in 1986-87; the painting was exhibited at the Metropolitan Museum of Art; and Taylor offered the painting at a public auction at Christie's in 1990 (it did not sell). *Id* 6a.

In December 2003, petitioners wrote to Taylor claiming ownership of the painting and demanding its return. Pet. App. 7a. In May 2004, Taylor filed a declaratory judgment action in the U.S. District Court for the Central District of California to establish clear title.[2] Only afterwards, in October 2004, did petitioners file a complaint in the same federal district court, asserting various federal and state-law causes of action against Taylor and seeking return of the painting.

---

1. "A *catalogue raisonné* is an annotated, illustrated book . . . which constitutes 'a definitive listing and accounting of the works of an artist.'" Pet. App. 3a (quoting *DeWeerth v. Baldinger*, 836 F.2d 103, 112 (2d Cir. 1987)).

2. Taylor's action was dismissed for lack of subject matter jurisdiction following dismissal of petitioners' action and is not before this Court.

The District Court dismissed petitioners' first amended complaint pursuant to Fed. R. Civ. P. 12(b)(6), and the U.S. Court of Appeals for the Ninth Circuit affirmed.[3] The Court of Appeals first held that the Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15 (1998) (the "Redress Act"), does not create a private right of action against private owners of works of art. Applying this Court's test for determining whether a statute creates an implied private right of action, *see Cort v. Ash*, 422 U.S. 66 (1975), the Court of Appeals concluded that (1) there is no indication of legislative intent – even among the statute's sponsors – to create a private right of action for Holocaust victims seeking restitution for artworks confiscated during the Nazi regime; (2) Holocaust victims are not a "beneficiary class" for purposes of *Cort*; (3) the purpose of the Redress Act is to encourage government efforts to facilitate the return of confiscated property and to broaden access to information regarding potential claims; and (4) the availability of state-law remedies renders implication of a federal right of action inappropriate. Pet. App. 8a-12a. Because the Redress Act "does not satisfy any of the *Cort* factors," the Court rejected petitioners' assertion of a federal right of action. *Id.* 13a.

---

3. As is appropriate on a motion to dismiss, the courts below accepted as true all of petitioners' factual allegations, including those regarding the painting's provenance and the circumstances of Taylor's acquisition of it. Pet. App. 7a-8a, 19a. Respondent, however, controverted these allegations in her amended complaint for declaratory relief and would continue to do so in the unlikely event that this litigation continues.

Second, the Court of Appeals held that petitioners' state-law claims were time-barred. California law, which applies to petitioners' claims, provides a three-year statute of limitations for actions arising from the taking of goods or chattels. Pet. App. 13a. That law was amended in 1983 to include a "discovery rule" governing actions for recovery of artwork under which a cause of action accrues when the rightful owner discovers the whereabouts of the artwork. *Id.* Petitioners agreed that their claims of a 1930s theft and a 1963 conversion were subject to the pre-1983 statute of limitations, but they argued that under a decision of a California intermediate appellate court, an "actual discovery" rule applied. *Id.* The California Supreme Court had not squarely decided what accrual rule governs in these circumstances, but in 1988 it had held that its discovery rule incorporated constructive notice. *Id.* (citing *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103, 1009 (1988)). The Court of Appeals concluded that in light of *Jolly*, the California Supreme Court would apply the constructive notice concept to pre-1983 actions for theft and conversion. *Id.* 14a. Because it was apparent from the face of petitioners' complaint that Taylor's acquisition of the painting was discoverable "most probably" by 1963, when she acquired it at auction, and "at least by" 1990, when she offered it for sale through Christie's auction house, the Court of Appeals held that petitioners' claims expired in or before 1993 (three years after the 1990 sale offer). *Id.* 15a.

## REASONS FOR DENYING THE PETITION

The judgment of the Court of Appeals was correct and does not conflict with any decisions of this Court or any other court of appeals. Whatever the merit, if any, of petitioners' public policy arguments, they are properly directed to Congress, not to this Court. Accordingly, further review is not warranted.

### I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS

Contrary to petitioners' contention, *see* Pet. 14-20, the circuit courts are not divided on the question of the statute of limitations applicable to claims involving stolen art. While the cases relied upon by petitioners do apply different accrual rules and limitations periods to replevin claims involving stolen art, those differences are purely a function of differences in state law, not of any split among the circuits on a question of federal law. In each of the cases cited by petitioners, a federal circuit court sitting in diversity applied substantive state law to determine whether a claim was timely filed. For example, the Second Circuit applied New York's "demand-and-refusal" accrual rule. *See Hoelzer v. City of Stamford*, 933 F.3d 1131, 1135-38 (2d Cir. 1991) (citing *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 569 N.E.2d 426, 667 N.Y.S.2d 623 (1991)). The Sixth Circuit applied Ohio law, under which questions of constructive notice in a replevin action generally are reserved for the jury, *see Charash v. Oberlin College*, 14 F.3d 291, 300 (6th Cir. 1994), and the Seventh Circuit interpreted Indiana law as requiring a plaintiff to exercise due diligence in discovering a theft, *see Autocephalous Greek-Orthodox Church of Cyprus*

*v. Goldberg and Feldman Fine Arts, Inc.*, 917 F.2d 278 (7th Cir. 1990). The fact that state laws impose varying rules governing the timeliness of claims to recover personal property is not a ground for intervention by this Court.

## II. PETITIONERS' REMAINING CONTENTIONS ARE ERRONEOUS AND DO NOT WARRANT REVIEW BY THIS COURT

### A. The Court of Appeals Correctly Held That the Redress Act Does Not Create an Implied Private Right of Action for Artwork Confiscated During the Nazi Regime

The Court of Appeals properly rejected petitioners' contention that the Redress Act creates an implied private right of action for recovery of artwork confiscated during the Nazi regime. Petitioners claim that the Redress Act, along with the Nazi War Crimes Disclosure Act, Pub. L. No. 105-567, 114 Stat. 2865 (1998), and the U.S. Holocaust Assets Commission Act of 1998, Pub. L. No. 105-186, 112 Stat. 611 (1998), evince a congressional intent to encourage such private actions. Pet. 2, 23-24. As the Court of Appeals held, the Redress Act's "Sense of the Congress" provision, upon which petitioners heavily rely, is precatory and does not create any enforceable rights. Pet. App. 9a-10a (citing, *inter alia*, *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 n.13 (1979)). The other two statutes do not even address restitution for private individuals: the Nazi War Crimes Disclosure Act requires disclosure of U.S. government documents relating to assets confiscated by the Nazis, and the Holocaust Assets Commission was created to investigate Nazi-confiscated assets that might be held by the U.S. government. Neither statute even makes reference to litigation by individuals as opposed to governmental action, much less expresses an intention to create a private right of action.

Even assuming, *arguendo*, that petitioners' argument on this point had any merit, there is no division among the federal courts on this question. It appears that only one other federal court has considered whether the Redress Act creates an implied private right of action to recover artwork confiscated by the Nazis and, like the courts below, concluded that it does not. *See Schopes v. The Andrew Lloyd Webber Art Foundation*, 06-CV 12934 (JSR) (S.D.N.Y.) (transcript of Nov. 7, 2006 preliminary injunction hearing at 5-7 (filed as supplemental authority by Ninth Circuit on Nov. 16, 2006)). Nor do public policy concerns, *see* Pet. 25-29, provide a basis for further review by this Court. To be sure, Holocaust-era restitution claims may raise significant legal and moral issues, and Congress expressed its view in the Redress Act that governments should take steps to facilitate enforcement of Holocaust victims' rights. But the existence of these issues does not transform what is essentially a case about a state statute-of-limitations law into one that presents a certworthy issue for this Court to resolve.

### B. The Court of Appeals Correctly Held That Petitioners' State Law Claims Are Time-Barred

Petitioners ask this Court to address two alleged flaws in the Court of Appeals' ruling that their action was time-barred: first, they contend that the courts below improperly resolved factual questions on a motion to dismiss, and second, they claim that the Court of Appeals failed to apply controlling state-court precedent in determining when their claims accrued. Both of these contentions merely request error correction that does not merit this Court's review. Moreover, petitioners' assertions of error are meritless.

Petitioners concede that a statute of limitations defense may be raised in the context of a 12(b)(6) motion if the untimeliness of the claim appears on the face of the complaint. Pet. 12. What they dispute is whether the allegations in their complaint did, in fact, demonstrate that their claims were untimely. *Id.* As both courts below held, the complaint makes clear that Taylor's acquisition of the painting was discoverable probably in 1963, when it was purchased for Taylor at a public auction, and, at the latest, by 1990, when she offered it for sale at a public auction. *See* Pet. App. 15a, 25a. Under California's three-year statute of limitations, the claims thus became untimely no later than 1993.[4]

Petitioners' second objection – that the Court of Appeals erred by failing to follow the "actual discovery" rule articulated in *Naftzger v. Am. Numismatic Soc'y*, 42 Cal. App. 4th 421, 49 Cal. Rptr. 2d (Cal. Ct. App. 2d Dist. 1996) – is wrong as a matter of law. As an initial matter, petitioners fail to note that just weeks after it was handed down, *Naftzger*, an intermediate appellate court decision, was criticized by another California intermediate appellate court in *Soc'y of Cal. Pioneers v. Baker*, 43 Cal. App. 4th 774, 783, 50 Cal. Rptr. 2d 865, 870 n.10 (Cal. Ct. App. 1st Dist. 1996), on the ground that it was inconsistent with California precedent. Thus, the Ninth Circuit was presented with conflicting intermediate appellate decisions regarding the applicable accrual rule. In any event, rulings of lower state courts are not controlling "where the highest court of the State has not spoken on the point." *Comm'r of Internal Revenue v. Estate*

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4. Although petitioners contend that the Court of Appeals should have equitably tolled the statute of limitations, *see* Pet. 13-14, that would have been inappropriate given petitioners' lack of reasonable diligence in identifying and pursuing their claim.

*of Bosch*, 387 U.S. 456, 465 (1967) (citation omitted). The Court of Appeals' determination that, if confronted with the issue, the California Supreme Court would have followed its own precedent holding that discovery rules generally incorporate a principle of constructive knowledge, Pet. App. 14a (citing *Jolly*, 44 Cal. 3d 1103), is reasonable and provides no basis for a grant of certiorari.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

ANDREW J. ORKIN, F. MARK ORKIN
and SARAH-ROSE JOSEPHA ADLER,

*Petitioners,*

*v.*

ELIZABETH TAYLOR,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## REPLY BRIEF

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Petitioners respectfully submit this reply brief in response to the respondent's opposition brief and in further support of their petition for a writ of certiorari.

This case is not merely "intriguing," as respondent says (Resp. Br. at 1), but is a cert-worthy vehicle for this Court to address the significant issues it raises. Because this case comes here on a motion to dismiss, all of petitioners' allegations are deemed true,[1] and the record is clear and uncontested. Petitioners are really only asking for the opportunity to prove their allegations according to settled rules of law, from which rules the lower courts departed radically, and for the opportunity to show the district court that they are entitled to their day in court, with the benefit of this Court's guidance about how such claims should be litigated.

*Amici curiae* B'Nai Brith Canada, the South African Jewish Board of Deputies, the Center for Holocaust and Genocide Studies of the University of Minnesota, and the Holocaust Restitution Claims Practicum of Cardozo Law School have attested in their briefs to the profound implications of this case, which transcend the interests of the parties over the ownership of one painting. Writing for the latter two *amici*, Prof. Michael Bazyler and Dr. Lucille Roussin state:

> *Amici* are concerned that the summary dismissal of the petitioners' well-founded and well-pleaded claims by the courts below on statute of limitations grounds, if allowed to stand, *will have a chilling effect on the outcome of future and current unresolved claims involving Holocaust-era looted art.* It is imperative that the law reasonably reflect the difficulties in establishing provenance of artworks looted during times of war, and especially during the Second World War.

---

1. Respondent acknowledges as much, *see* Br. in Opposition at 2 n.3.

> Historically, the Holocaust represents the most extreme example of pillage of property that has been a prelude to almost every genocide. *Amici*'s involvement in this case is rooted in their conviction that *the restitution of Nazi-looted property to its rightful owners is an integral part of efforts to ensure that the law does not sanction genocide and pillage*.
>
> Br. of Center for Holocaust and Genocide Studies ("CHGS brief") at 2 (emphasis added).

## I. The Ninth Circuit Ignored Ancient And Recent Controlling Case Law From The Supreme Court Of California Regarding Delayed Discovery And Accrual Of Claims. This Alone Is Grounds For Granting Certiorari.

In dismissing petitioners' claims, the Ninth Circuit and the district court relied entirely on Cal. Civ. Proc. Code § 338(c), which created a three-year statute of limitations, and on *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103 (1988), which held that a cause of action accrued when a plaintiff discovered, or reasonably could have known of, the existence of a claim to property. In rejecting the approach of *Naftzger v. Am. Numismatic Soc'y*, 42 Cal.App.4th 421 (2d Dist. 1996) in favor of a rule it purported to deduce from *Jolly*, the Ninth Circuit concluded "that it is highly unlikely that the California Supreme Court would abandon the *Jolly* rule, much less adopt a new rule that eschewed the concept of constructive notice." (487 F.3d at 741).

The Ninth Circuit's approach is clearly erroneous for three reasons:

> (1) It ignores ancient and recent controlling case law from the California Supreme Court adopting the delayed discovery rule and clarifying when knowledge can be imputed;
>
> (2) It incorrectly assumes that a cause of action for theft necessarily accrues when the identity of the possessor becomes known (as opposed to when the

> rightful owner knows, or ought reasonably to know, that a wrong has been done); and
>
> (3) It contravenes compelling public policy, including the concern that plaintiffs should not be required to sue precipitously, before the evidence reasonably available to them is sufficient to show that they have legitimate claims.

The recent controlling case of *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal.4th 797 (2005) is an exhaustive treatment of the long-accepted delayed discovery rule, recognized in California at least since *Kimball v. Pacific Gas & Electric Co.*, 220 Cal. 203 (1934). In *Fox*, the California Supreme Court said:

> We conclude that, under the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, *unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action.* In that case, *the statute of limitations for that cause of action will be tolled until such time as a reasonable investigation would have revealed its factual basis.* 35 Cal.4th at 803 (emphasis added).

In affirming the delayed discovery rule, the California Supreme Court reviewed and consolidated its earlier decisions on the subject, including *Jolly* and *Norgart v. Upjohn Co.*, 21 Cal.4th 383 (1999). The Court repeated, based on these earlier decisions, that accrual occurs when the plaintiff has "inquiry notice" of *all* of the "generic elements" of the cause of action. These "generic elements" include "wrongdoing" in addition to "cause" and "harm" (*Norgart, supra*, 21 Cal.4th at 397; *Jolly, supra*, 44 Cal.3d at 1107, 1109-14; *Fox, supra*, 35 Cal.4th at 807).

Thus, the plaintiff in *Fox* could proceed with an otherwise untimely claim against a medical device manufacturer, because

the Court found that she could not reasonably have known of the existence of her claim until the key facts were revealed during the deposition of her treating physician. Recently, the delayed discovery rule was applied, and *Fox* followed, in *E-Fab, Inc. v. Accountants, Inc. Services*, 153 Cal.App.4th 1308 (4th Dist. 2007), to permit the plaintiff to proceed with a claim of negligent misrepresentation, when the facts of the misrepresentation were only learned years later. The court held the action timely: "in actions where the [delayed discovery] rule applies, the limitations period does not accrue until the aggrieved party has notice of the facts constituting the injury." *Id.* at 1318; citing *Fox*.

The California Supreme Court further confirmed in *Fox* that knowledge of the defendant's identity is not "normally" an element of a cause of action, and that knowledge or ignorance of this fact will neither trigger nor delay accrual (*Fox, supra*, 35 Cal.4th at 807, *quoting Norgart, supra*, 21 Cal.4th at 399, *quoting Bernson v. Browning-Ferris Industries*, 7 Cal.4th 926, 932 (1994), which in turn cited *Jolly, supra*, 44 Cal.3d at 1114). In *Bernson*, however, the Court recognized that the defendant's identity might be an element in some exceptional contexts.

Applying *Bernson*, *Naftzger* was addressed to the element of the defendant's identity in such a context, namely that of stolen art (42 Cal.App.4th at 431). In concluding that actual knowledge of the possessor's identity was an element of the § 338(c) claim, *Naftzger* sought to distinguish its subject matter from the products liability claims in *Jolly* and *Norgart* (in which identity was not an element), and explain how the unusual nature of stolen artwork brought such claims within the exception set out in *Bernson*. However, with respect to the generic elements of all causes of action, namely wrongdoing, cause and harm, *Naftzger* is consistent with *Jolly*.

Thus, even if the defendant's identity is not an element of the cause of action and *Naftzger* is disregarded, a cause of action for theft cannot accrue under *Jolly*, *Norgart* and *Fox* until *all* elements of the theft are known or at least reasonably suspected.

Moreover, *Fox* holds that, *irrespective of whether the identity of the possessor is known*, a claim concerning stolen property will survive a motion to dismiss if the plaintiff pleads the facts regarding the delayed discovery of the theft, namely "(1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence" (35 Cal.4th at 808, *quoting McKelvey v. Boeing North American, Inc.*, 74 Cal.App.4th 151, 160 (1999); emphasis in original).

In the present case, the Ninth Circuit's holding of accrual was founded on the single element of defendant's identity and its conclusion that "Taylor's acquisition of the painting was certainly discoverable at least by 1990" (487 F.3d at 741). Yet *Fox* states that accrual occurs only when *all* generic elements are revealed by a reasonable investigation. Thus, in concluding that the "apparent" discoverability of respondent's identity necessarily rendered petitioners' claim untimely, and in citing *Jolly*'s constructive knowledge rule as the sole basis for dismissing petitioners' claims, the Ninth Circuit ignored the contrary, and controlling, holding of the California Supreme Court, failed to apply the correct test for the accrual of petitioners' claims, and ignored their allegations regarding delayed discovery, which had to be deemed true.

As elaborated in the CHGS *amicus* brief at 13-16, the Ninth Circuit failed to recognize that petitioners' pleadings amply satisfied the *Fox* requirements for delayed discovery.[2] The lower courts also failed to consider, as *Fox* required, that petitioners had alleged that a reasonable investigation would not have revealed the factual basis for their claims earlier, given the circumstances of the Holocaust, and the actions taken since 1963

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2. Plaintiff alleged both the time and manner of discovery and their inability to have made earlier discovery despite reasonable diligence at ¶¶ 103-07 of petitioners' amended complaint. *See also* Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss, January 31, 2005, at 18-19; Appellants' Brief in the Ninth Circuit at 16-17, 26-27, 70-71, 75-76.

by Sotheby's, Christie's and the respondent to obscure the Holocaust-era provenance of the painting.[3]

*See also Bernson, supra* and *Kimball, supra*, in which the California Supreme Court held (in 1994 and 1934 respectively) that concealment by the defendant of an element of a cause of action (which petitioners allege here) would toll the statute of limitations, and reversed the lower court's summary dismissal of the complaint. "The problem [of delayed discovery] arises not infrequently when the owner of stolen artwork discovers its whereabouts many years after the theft and files an action to recover the property." *Bernson, supra*, 7 Cal.4th at 933.[4]

The Ninth Circuit also ignored the public policy implications. California courts have consistently emphasized the importance of public policy in the discovery rule: "[S]tatutes [of limitations] should not be interpreted so as to bar a victim of wrongful conduct from asserting a cause of action before he could reasonably be expected to discover its existence." *Saliter v. Pierce Brothers Mortuaries*, 81 Cal.App.3d 292, 297 (1978). The discovery rule "protects the plaintiff, whose cause of action is preserved when, despite diligent investigation, he is blamelessly ignorant of the cause of his injuries. It also protects the defendant, who is spared precipitous litigation." *Bastian v. County of San Luis Obispo*, 199 Cal.App.3d 520, 529 (1988).

The *Fox* court also affirmed the importance of discouraging premature litigation:

> It would be contrary to public policy to require plaintiffs to file a lawsuit at a time when the evidence available to them failed to indicate a cause of action . . . Indeed, it would be difficult to describe a cause

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3. *See* 17-31, 104, 107 of petitioners' amended complaint; Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss, January 31, 2005, at 2 and 19; Appellants' Brief in the Ninth Circuit at 10-12, 73-75.

4. The trial judge whose decision was reversed in *Bernson* later became the district judge who rendered the decision under review in this case.

> of action filed by a plaintiff, before that plaintiff reasonably suspects that the cause of action is a meritorious one, as anything but frivolous . . . In sum, the interest of the courts and of litigants against the filing of potentially meritless claims is a public policy concern. 35 Cal.4th at 815 (citations and quotation marks omitted).

The district court here said that petitioners "fail[ed] to allege any diligence on Plaintiffs' part, much less any reasonable diligence," *Adler v. Taylor*, 2005 U.S. Dist. LEXIS 5862 at *13 (C.D.Cal., Feb. 2, 2005), and this finding was affirmed on appeal. But this is flatly contradicted by the record (*see* n.2 and 3, *supra*). In 1963 (when, according to the lower courts, the cause of action first accrued), Margarethe Mauthner had been dead for sixteen years. Her direct heir, petitioners' grandfather and the only other heir who might have had knowledge of the facts of Mauthner's loss of the painting, was then 86 years old, in ill health and in South Africa. How could the cause of action be considered "complete with all of its elements" (*Fox*, 35 Cal.4th at 806) in 1963, when there was no heir alive who had reason to suspect the existence of a claim?

Having no art expertise, petitioners allege that they (like thousands of other Holocaust art claimants) reasonably only began to investigate the possibility of wrongdoing with respect to Mauthner's art collection when the subject and issues of Nazi-looted art came to public attention in the late 1990's. They then spent two years performing exhaustive research, in five countries and three continents, before they discovered the obscured and hitherto unavailable facts demonstrating that they had a cause of action, enabling them to file a non-frivolous complaint. For a court then to dismiss their claims because they took too long would be either to punish them for their diligence or require them to have brought an action without full knowledge of the facts. It would also punish them for offering to mediate their dispute with respondent (which offer was rebuffed) or their efforts to negotiate a resolution (which process was abruptly

terminated by respondent's precipitous declaratory judgment action).

The overarching concern highlighted in the *amici* briefs is that claims concerning Nazi-looted art are not ordinary stolen property claims. As the *amici* argue, the resolution of such claims must consider both the context of the Holocaust and its persistent and pernicious aftermath, and consistent and strong U.S. public policy. The lower courts' rigid approach to statutes of limitations ignored the well-established and controlling delayed discovery rule; disregarded the allegations of petitioners' due diligence; improperly and summarily resolved issues of fact as to that due diligence; and turned away from consistent U.S. policy that restitution must be promoted and not hindered by the reflexive application of state statutes of limitation.

## II. This Case Is Not, As Respondent Asserts, Only About State Statutes Of Limitations. Long-Standing U.S. Government Policy Regarding Restitution Of Nazi-Looted Artworks Preempts Contrary State Law Governing Accrual Of Claims.

Statutes of limitations are properly areas of state jurisdiction, absent constitutional constraints (*Norgart*, 21 Cal.4th 383 at 396-97). But with respect to Nazi-looted art, a compelling constraint *is* present. If state law is permitted to defeat such claims summarily, the consistent and long-standing U.S. government policy requiring restitution will be vitiated. Thus that policy must prevail under the Supremacy Clause.

The three 1998 federal statutes, when interpreted in light of consistent pronouncements of U.S. officials and Military Government Law No. 59, create an implied right of action pursuant to *Cort v. Ash*, 422 U.S. 66 (1975). Respondent's opposition brief erroneously says (at 5) that this implied right of action is limited to the "Sense of Congress" provision of the Redress Act (§ 202). But, like the Ninth Circuit, respondent ignores the clear statement, at § 201(5), that "the same international legal principles applied among states [described

at § 201(1)-(3)] should be applied to art and other assets stolen from victims of the Holocaust."

Moreover, as argued in the CHGS brief (at 4-10), U.S. policy can be effectuated by the preemption principles of *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003). In *Garamendi*, this Court held that, in view of U.S. policy expressed in various international executive-branch agreements regarding the handling of Holocaust-related insurance claims, California legislation placing reporting requirements on insurance companies constituted improper state intrusion and was preempted.

*Garamendi* should be read for the proposition that state statutes of limitations must not be construed so as to defeat claims that the executive and legislative branches have repeatedly said should be adjudicated on their merits. Just as the California Legislature was held to have interfered with the U.S. government's conduct of foreign relations in that case, the Ninth Circuit similarly interfered with the U.S. government's policy of restitution when it summarily dismissed petitioners' claims.

The issues raised by this case continue to be of current importance. While preparing this reply brief, petitioners learned of two more cases involving Nazi-looted art. *See* Marlise Simons, *Heirs Make Huge Claims Over Dutch Works of Art*, New York Times, September 26, 2007 at E1 (claim by heirs of Dutch Jewish art dealer for 227 artworks recovered in Germany at the end of WWII and now in Dutch museums); and Robin Pogrebin, *A Dispute Over a Klimt Purchased in New York*, New York Times, September 26, 2007 at B5 (grandson of Viennese woman who died in the Holocaust claims that Klimt painting now in collection of Leonard Lauder was looted during WWII, and seeks restitution). As *amici* attest, this unprecedented trend can only be understood by recognizing the unique context of the Holocaust and its long unacknowledged impact on subsequent generations, and also on the global art market. Holocaust survivors and their heirs have only recently begun to

overcome the trauma they have experienced, and critical information and knowledge about the era has only recently become widely available. Books and films such as the just-released The Rape of Europa[5] are informing present generations about what happened at that time, and about the legitimacy of their pursuit of claims after more than sixty years. This Court's decision in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) also brought these issues into the public consciousness.

Petitioners respectfully urge this Court to continue to speak to the profound issues raised by these cases, and to insure that settled law about the accrual of claims is equitably applied throughout the Nation. As more Holocaust survivors and their descendants only now learn of their rights and seek restitution of what is rightfully theirs, the need for uniformity in the just treatment of their claims becomes ever more pressing.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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5. *See* Lynn H. Nicholas, *The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War* (1994), and the recent documentary film of the same name, whose website is *http://www. rapeofeuropa.com*)(last visited September 27, 2007).

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IN THE

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ANDREW J. ORKIN, F. MARK ORKIN
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*Petitioners,*

*v.*

ELIZABETH TAYLOR,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## BRIEF OF B'NAI BRITH CANADA AND THE SOUTH AFRICAN JEWISH BOARD OF DEPUTIES AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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## INTERESTS OF THE *AMICI CURIAE*[1]

The *amici curiae* B'nai Brith Canada ("BBC") and South African Jewish Board of Deputies ("SAJBD") both have among their members numerous German-Jewish and other refugees with first-hand experience of the Holocaust, including death camps, slave labor and involuntary dislocation to other countries. These experiences in part define the communities that the *amici* represent, and are a key aspect of the knowledge, aspirations and teachings that they bring to bear in all their activities, including participation in this case.

**B'nai Brith Canada** is the independent voice of the Canadian Jewish community, which numbers approximately 348,000, and is the fourth largest Jewish community in the world, after the United States, Israel and France. BBC represents the Canadian Jewish community's interests in Canada and internationally to government, NGO's and the wider public. Since 1875, it has been respected for its groundbreaking work on matters relating to anti-Semitism, racism and human rights, its strong advocacy on the pressing civil rights issues of the day, and the important social services it provides. The organization is maintained through the generosity of Canadians who value its independence and integrity, as well as its non-partisan, inclusive approach.

Through its agency the League for Human Rights, B'nai Brith Canada counters hate activity and promotes greater

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[1] Pursuant to this Court's Rule 37 subd. 2.(a), all parties have consented to the filing of this brief by the *amici curiae*. Letters evidencing such consent are being filed with the Clerk of the Court with this brief. Pursuant to this Court's Rule 37 subd. 6, the *amici* confirm that no counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amici*, their members and their counsel, made a monetary contribution to the preparation or submission of this brief.

tolerance. Its *Annual Audit of Antisemitic Incidents* is referred to as an authoritative source by government, research institutions and community groups in Canada, United States and elsewhere. League programming, including its *Taking Action Against Hate* and its *Holocaust and Hope* educational seminars, have been key in its ongoing advocacy efforts. Through its agency the Institute for International Affairs, B'nai Brith Canada speaks out on matters affecting the Jewish community and human rights internationally.

The **South African Jewish Board of Deputies** is the central representative institution of South Africa's 100,000 member Jewish community. Most of the country's Jewish congregations, societies and institutions are affiliated with it. The SAJBD was established in 1903-1904, "to watch and take action, with reference to all matters affecting the welfare of Jews as a community." It is the mission of the SAJBD to "work for the betterment of human relations between Jews and all the other peoples of South Africa based on mutual respect, understanding and goodwill. The SAJBD is committed to a new South Africa where everyone will enjoy freedom from the evils of prejudice, intolerance and discrimination." From its beginning more than a century ago, the SAJBD was active in protesting discrimination against Jews in South African immigration and naturalization laws. The Board was later active on behalf of German Jewry and the displaced persons of World War II. The Board maintains contact with other Diaspora Jewish communities around the world – including a large diaspora of South African Jews – and supports those Jews who suffer discrimination, injustice and distress, wherever they may be located.

The principal interest of the *amici* in this case stems from their longstanding commitment to ensuring that anti-Semitism and discrimination are not tolerated, abetted or rewarded, and that the rights and interests of Jews, in Canada, South Africa and everywhere else, are appropriately and justly

recognized and protected. The *amici* strongly believe that the issues of Holocaust restitution that are now emerging worldwide represent a vital continuation of the international and universal moral challenges presented by genocide and discrimination, wherever these acts occur.

This case involves a claim by the heirs of a German Jewish refugee to ownership of a Van Gogh painting now in the collection of Elizabeth Taylor. The petitioners' antecedents fled Nazi persecution in March 1939, arriving in South Africa as part of those few fortunate people who managed to escape the systematic mass extermination that soon engulfed the Jews of Europe. All of the petitioners were born in South Africa. Two are South African citizens and members of the South African Jewish community. One is a Canadian citizen and member of the Canadian Jewish community.

The interest of the *amici* in this case also attests to the unique international dimension of Holocaust art and other restitution claims involving high-value and highly portable items vulnerable to theft during times of war, and the important and internationally recognized role of the United States and its courts in providing moral leadership in addressing these issues.

The *amici* are deeply concerned with the moral and legal Holocaust-related issues raised by this case, and wish to make known their hope, and the reasons therefor, that the petition for *certiorari* be granted, so that this case may be heard on the merits by the Supreme Court of the United States.

## SUMMARY OF THE ARGUMENT

The issues of restitution of Holocaust-era looted art raised by this case are of deep interest to a population far broader than the parties alone, in the United States and internationally. Holocaust restitution is a profound and current civil and human rights issue that has been the subject of consistent U.S. policy since the end of World War II.

The issues raised by this case are compelling and timely. The particular and complex equities of Holocaust-era claims remain inadequately recognized by the law in this area. It is only when *all* aspects and equities of this history are fully integrated in a balanced way into the adjudication of these disputes, that the civil and human rights imperatives of Holocaust accountability and redress can at last be met. These equities include the debilitating and complete dislocation and dispersal of European Jewish refugees from Nazi persecution; the psychological and social trauma they and subsequent generations faced; and the overwhelming impediments to investigation and claims, arising from the complexities of the international art market, the unavailability of information, and the obscuring or laundering of key Holocaust-era provenance details.

These equitable factors are raised by the facts as alleged in the current case, and the summary nature of the judgments of the lower courts raise questions of serious concern to the *amici*. The art trade and many of the world's most important art collections are concentrated in the U.S., and decisions of the U.S. courts are looked to and relied upon by courts the world over. It is critical that the Supreme Court of the United States provides coherent and uniform direction on the equitable and just resolution of restitution claims involving Nazi-looted art. It is respectfully submitted that the petition for *certiorari* should therefore be granted in this case.

## ARGUMENT

### 1. THIS CASE IS IMPORTANT TO A FAR BROADER POPULATION, IN THE U.S. AND INTERNATIONALLY , THAN JUST THE PARTIES. THE ISSUES IT RAISES ARE TIMELY AND SHOULD BE ADJUDICATED ON THEIR MERITS.

Holocaust redress- and justice-related issues posed to the Court in this case are of deep concern to Jews all over the world, including the community of Jews represented by the *amici*. Even though the horror of the Holocaust was experienced more than a half-century ago, the crucially important legal and moral redress questions it raises remain significantly unresolved today. In fact, given the appalling physical, psychological and social dislocation experienced by Holocaust survivors, many of these issues are only now being articulated and pursued.

At the historic Washington Conference on Holocaust-Era Assets which took place in 1998, more than fifty years after the Holocaust, Conference Chairman Judge Abner Mikva said:

> [The] Nazis confiscated art works of individuals as part of a deliberate and premeditated program to enrich their leaders, finance their military aggression, and exterminate an entire people . . . [P]ost-war restitution policies . . . fell short of restoring property to many individuals. We have reached a greater understanding of why restitution issues were dormant for so many years and why they have suddenly reappeared with renewed force, creating a challenge to legal frameworks, all sectors of the art world, and concepts of morality and justice." Concluding statement at the

> Washington Conference, December 3, 1998, http://fcit.usf.edu:16080/Holocaust/resource/assets/concl.htm (last visited September 15, 2007).

The *amici* are interested in ensuring that this special context is not overlooked in the adjudication of Holocaust claims, including in the present case. It is submitted that the particular and complex equities of Holocaust-era claims are not yet being adequately recognized by the law in this area:

> [W]e should not apply rules designed for commercial transactions of societies that operate under the rule of law to people whose property and very lives were taken by one of the most profoundly illegal regimes the world has ever known.
>
> Under Secretary of State and Clinton Administration representative for Holocaust-related issues Stuart E. Eizenstat, Proceedings of the Washington Conference, December 3, 1998, at 418, http://fcit.usf.edu/Holocaust/resource/assets/heac3.pdf (last visited September 15, 2007).

## 2. HOLOCAUST RESTITUTION IS A PROFOUND AND CURRENT CIVIL AND HUMAN RIGHTS ISSUE: THE HOLOCAUST WAS BOTH A GENOCIDE AND THE LARGEST THEFT IN HISTORY OF ART AND OTHER ASSETS.

As Sidney M. Clearfield, Executive Vice President of B'nai B'rith International observed in September 1998 to the New York State Senate:

> The Holocaust was not only history's biggest mass murder, but also its largest robbery. In addition to

> homes, businesses, bank accounts, insurance policies and even wedding rings and gold tooth fillings, the Nazis and their collaborators plundered a vast quantity of valuable art work from Europe's Jews. Art that Jews had been forced to sell for a pittance, or that simply had been stolen from them, passed through middlemen to established galleries, collectors, and respected museums. (*Letter*, September 25, 1998, B'nai Brith International to The Honorable Joseph Bruno, Majority Leader, New York State Senate)

Given the strong linkages between systematic theft, dispossession and extermination in the Nazi project, restitution of Holocaust-era looted assets must be recognized as an integral part of achieving justice for Holocaust victims. Rabbi Israel Singer of the World Jewish Congress has stated:

> Himmler said you have to kill all the Jews because if you don't kill them, their grandchildren will ask for their property back. The Nazis wanted to strip Jews of their human rights, their financial rights and their rights to life. It was an orderly progression. I want to return to them all their rights. (*quoted in* Michael Bazyler, *The Holocaust Restitution Movement in Comparative Perspective*, 20 Berkeley J. Intl L. 101, 132 (2002)).

The scope of the art pillage during the 1930's and 40's may have been twenty percent of all Western art (Walter V. Robinson, "U.S. tracked WWII influx of looted art", Boston Globe, May 9, 1997 at A1). Sue Choi writes in her 2005 article, *The Legal Landscape of the International Art Market*

*After Republic of Austria v. Altmann*, 26 Nw. J. Int'l L. & Bus. 167 (2005), that:

> Historians estimate that between $230 and $320 billion in assets were stolen, including an estimated $ 20.5 billion in artwork, as a result of Adolph Hitler's regime during the Second World War. The unprecedented theft of Europe's art collections included more than 240,000 artworks from museums and private collections being displaced, transported and stolen by 1944. It is estimated that the scale of looted European art during the Nazi period exceeded that of all the Napoleonic Wars combined. (footnotes omitted).

The aftermath of this wholesale Nazi theft was and remains on an immense scale, requiring that the international dispersal of vast quantities and billions of dollars of portable high-value assets such as paintings, antiquities and gold be tracked and addressed:

> It took 29,984 railroad cars, according to records from the Nuremberg trials, to transport all the German-stolen art back to Germany. The value of the art plundered during the Holocaust exceeded the value of all artworks in the United States in 1945 . . . The Nazi art confiscation program was the greatest displacement of art in human history. Bazyler, *supra*, at 202.

Because of the scope of the plundering, forced sales and other thefts, countless thousands of artworks were wrongfully taken from Jewish owners. It has been reported that, "[e]stimates of the number of Holocaust-related displaced artworks still missing today, more than 60 years after the

end of World War II, hover around 100,000." Michelle Falkenstein, *Far from the Goal*, ARTNews, December, 2006 at 130.

*Amici* are interested in ensuring that the contemporary legal framework recognizes the extraordinary enormity and complexity of Holocaust-era art claims, and that it takes into account and properly balances all of the facts and all of the equities arising from this history. It is only when all aspects are integrated in a fully balanced way into the adjudication of these disputes, that the civil and human rights imperatives of Holocaust accountability and redress can be met. The common law of the United States – and also of South Africa and Canada – already embodies the tools required to deliver justice in this regard. They include the principles of *nemo dat qui non habet*, *ex turpi causa*, and *audi alteram partem*, which equitable principles have always followed the law of limitations and laches. In the case of the horror of the Holocaust and the vast value of the property still potentially at issue, these dictates of equity should not be permitted to fall by the wayside.

## 3. THE COMPLETE DISLOCATION AND DISPERSAL OF EUROPEAN JEWRY WAS A DEBILITATING CONSEQUENCE OF THE HOLOCAUST, AND THIS EXTRAORDINARY CONTEXT SHOULD BE TAKEN INTO ACCOUNT IN DETERMINING THE TIMELINESS OF SUCH CLAIMS.

European Jewish refugees escaped the horrors of the Holocaust by fleeing to the United States, Canada, South Africa and other countries. These newcomers had to re-establish themselves completely wherever they landed, building new homes, often learning new languages and trades, all while trying to restore a sense of normalcy out of the

ashes of destroyed lives. As in the present case, many survivors were aged when they were dispersed as refugees.

The Holocaust scattered the Jewish community around the world. For many newly settled Jews, the process of starting over was all-consuming. Given the constraints of distance, and the burdens of re-establishing their lives, it would be callous and unrealistic to expect the traumatized and dislocated victims of Holocaust persecution to have undertaken the technical effort required to trace and claim lost (and often laundered) assets. This important task now falls on the shoulders of succeeding generations, and this Court should assist them in fulfilling it.

## 4. THE HORRORS OF THE HOLOCAUST, AND THE ENDURING PSYCHOLOGICAL AND SOCIAL TRAUMA IT CAUSED, ARE A FUNDAMENTAL REASON JUSTIFYING DELAY IN THE EMERGENCE OF HOLOCAUST REDRESS CLAIMS.

In many instances, Jews who survived the Holocaust have been traumatized by their experiences. Feelings of guilt and shame at having survived, or fear of being targeted again, for example, made it difficult for some survivors to discuss their experiences and losses for many years, if at all. These well-documented widespread and lifelong psychological impacts delayed the ability of survivors who had been young at the time of the Holocaust (and also subsequent generations) to bring claims for redress. *See generally* William G. Niederland, *The Problem of the Survivor: Some Remarks on the Psychiatric Evaluation of Emotional Disorders in Survivors of Nazi Persecution*, 10 Journal of the Hillside Hospital 233 (1961); Shamai Davidson, *Transgenerational Transmission in the Families of Holocaust Survivors*, 1 International J. Family Psychiatry 98 (1980); F. Hogman, *Trauma and Identity Through Two Generations of the Holocaust*, 85 Psychoanal. Rev. 551 (1998); Brian Trappler

*et al.*, *Impact of Early Lifetime Trauma in Later Life: Depression Among Holocaust Survivors 60 Years After the Liberation of Auschwitz*, 15 Am. J. Geriatric Psychiatry 79 (2007); H. Klein and I. Kogan, *Identification Processes and Denial in the Shadow of Nazism*, 67 Int. J. Psychoanal. 45 (1986); Joanne Levine, *Working with Victims of Persecution: Lessons from Holocaust Survivors*, 46 Social Work 4 (2001); Lea Baider *et al.*, *Transmission of Response to Trauma? Second-Generation Holocaust Survivors' Reaction to Cancer*, 157 Am. J. Psychiatry 904 (2000); John Sigal *et al.*, *Some Second Generation Effects of Surviving the Nazi Persecution*, 43 Am. J. Orthopsychiatry 320 (1973).

As observed by Derek Brown (*Litigating the Holocaust: A Consistent Theory in Tort For The Private Enforcement of Human Rights Violations*, 27 Pepp. L. Rev. 533 (2000)):

> Many survivors – in 2000 the average age of which is 82 years old – would prefer to leave alone these painful issues. Discussing the horrors of the Holocaust in monetary terms is seen by many survivors as a profit-motivated desecration of the memory of those who perished. (footnotes omitted).

In the case of many other Holocaust survivors, who were already old when the Holocaust displaced them, the opportunity to seek material redress simply never arose. Given the extreme psychological trauma in the years immediately following the Holocaust, the death of first-hand claimants obliterated much of the information that might have enabled their heirs to investigate and initiate claims promptly.

In many cases, Holocaust survivors were not psychologically able to engage in the efforts required to seek the just return of their property, as they had lost so much more as a result of the genocide. In these situations, it is

only as second and third generations learn of their forebears' history, and with the benefit of the passage of time, that they are able to confront the deep trauma and undertake the necessary investigation to press their claims.

The Orkins's case appears to be highly illustrative of this phenomenon. According to the facts presented in the petitioners' filings in the courts below, the owner of the painting in dispute died in South Africa in 1947 at the age of 84, and her immediate heir died in 1964 at the age of 86 after a long illness. The next generation of Holocaust refugees in the family were apparently young when they fled Germany and knew few if any details about the circumstances of the material losses of their grandparent and parents. It is only the next generation of Orkins, apparently prompted and explicitly encouraged by U.S. Government laws, international Holocaust-confiscated art conference principles and other initiatives of the late 1990s, that began investigating its family's Holocaust redress rights and claims. Moreover, it is only after significant investigation that the Orkins appear to have realized that they had a viable claim.

A 20/20 hindsight perspective as to when a claim ought "reasonably" to have been made, based on a vantage point of current understandings and recent advances concerning Holocaust restitution, will perforce systematically ignore and trivialize the enormous challenges that faced Holocaust survivor refugees in the postwar years. It is respectfully submitted that such a hindsight perspective, as appears to have been accepted as the appropriate legal approach in the courts below in this case (with the result that a hearing on the merits was never allowed), risks widespread and repeated unjust results. This is of grave concern to the *amici*.

## 5. THE INTERNATIONAL DISPERSAL OF NAZI-LOOTED ART INTRODUCED FURTHER IMPEDIMENTS, THE EQUITIES OF WHICH MUST BE RECOGNIZED IN DETERMINING THE TIMELINESS OF RESTITUTION CLAIMS.

Valuable assets owned by European Jews were looted and confiscated by the Nazis, and sold on international markets in Switzerland and other international centers, ultimately "turning up in surprising places" in the United States, South America, Europe and elsewhere. Michael J. Bazyler, *Holocaust Justice: The Battle for Restitution in America's Courts* (2003) at 204 and generally chapter 5. The facts as alleged in this case are emblematic of the complete dispersal of the property that was owned by the Jews of Germany during the Holocaust. That is, the painting was apparently conveyed from Germany via Switzerland, South America and London, to the United States. The dispute over its ownership involves persons in the United States, South Africa, Canada and Australia.

This special context of international dispersal, disappearance, laundering, obscured Holocaust-era provenance details, and the distant resurfacing of Holocaust-era art introduces unique complexities and equities into claims such as those put forward in the present case, which must be fairly taken into account in redressing the impacts of the Holocaust.

International dispersal, and consequent challenges, were expressly recognized in the U.S. Government-led Washington Conference Principles on Nazi-Confiscated Art of 1998. In the preamble to the Principles, the many participating governments stated that "[i]n developing a consensus on non-binding principles to assist in resolving issues relating to the restitution of Nazi-confiscated art, the Conference recognizes that *among participating nations there are*

*differing legal systems and that countries act within the context of their own laws*" (emphasis added). Nevertheless, six decades after the Holocaust, the Conference devoted one of the eleven fundamental Holocaust-era art principles to the concern of encouraging "Pre-War owners *and their heirs*" to finally "come forward and make known their claims". *See* Washington Conference Principles On Nazi-Confiscated Art, Released in connection with the Washington Conference on Holocaust-Era Assets, Washington, DC, December 3, 1998, *available at http://www.state.gov/p/eur/rt/hlcst/23231.htm* (U.S. Department of State website last visited September 15, 2007) (emphasis added).

The articulation and multinational entrenchment of this particular international principle establishes that the Government of the United States and many other countries recognized that almost 60 years after the Holocaust began there were still broad and insurmountable problems and barriers preventing many Holocaust-era owners or their heirs (the second and subsequent generations) from coming forward to make claims to their Nazi-confiscated art. The problem was perceived by the United States and many other governments involved to be worthy of being explicitly addressed in their Principle 7, which expressly encourages Holocaust-era owners and heirs to come forward to make claims.

## 6. THE UNITED STATES IS A WORLD LEADER IN EFFORTS REQUIRING RESTITUTION OF STOLEN HOLOCAUST-ERA ASSETS, AND THE IMPERATIVE OF RESTITUTION MUST BE AFFIRMED AND CONTINUED.

Since 1945, with the Nuremberg trials and such laws as Military Government Law No. 59, the United States has shown consistent moral, political and legal leadership on

Holocaust accountability, including restitution for Nazi-era assets which were stolen or changed hands as a result of coercion. This leadership has recently been re-affirmed with the passage of the Holocaust Victims Redress Act, Pub. L. No. 105-108, 112 Stat. 15 (1998) the Nazi War Crimes Disclosure Act, Pub. L. 105-567, 114 Stat. 2865; and the United States Holocaust Assets Commission Act, Pub. L. 105-186, 112 Stat. 611, not tc mention the U.S. Government-led international initiatives resulting in the 1998 Washington Conference Principles on Nazi-Confiscated Art.

At that historic international conference, Under Secretary of State Eizenstat said, "[w]e have moved from sadness and moral outrage, through a clearheaded definition of the issues and problems, to a strong determination to resolve the issues, with more and more countries committing themselves to doing more than what has been done up to now": Proceedings of the Washington Conference, December 3, 1998, *supra*, 415.

Decisions of the Supreme Court of the United States are relied upon by courts the world over. Moreover, the art trade and many of the world's most important art collections are concentrated in the U.S. It is critical that U.S. courts provide coherent and uniform direction on the equitable and just resolution of restitution claims involving Nazi-looted art, regardless of where this art surfaces. This Honorable Court should grant *certiorari* in this case, to allow all of the compelling facts and equities to receive a hearing on their merits.

## CONCLUSION

For all of the above reasons, the petition for a writ of *certiorari* should be granted.

Dated: La Mesa, California
September 19, 2007

Respectfully submitted,

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IN THE

# Supreme Court of the United States

ANDREW J. ORKIN, F. MARK ORKIN
and SARAH-ROSE JOSEPHA ADLER,

*Petitioners,*

*v.*

ELIZABETH TAYLOR,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## BRIEF OF THE CENTER FOR HOLOCAUST AND GENOCIDE STUDIES AND THE HOLOCAUST RESTITUTION CLAIMS PRACTICUM OF THE BENJAMIN N. CARDOZO SCHOOL OF LAW AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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## INTEREST OF THE *AMICI CURIAE*[1]

The **Center for Holocaust and Genocide Studies** at the University of Minnesota ("the Center") is a leading resource for information, scholarly study, and teaching about the Holocaust and contemporary aspects of genocide. The Center is an independent center at the University of Minnesota, established in 1997, and administered through its history department. The issue of Holocaust-era looted art has been one of the Center's concerns and areas of expertise. The Center also has one of the largest web sites in the world (http://www.chgs.umn.edu) related to art and the Holocaust, which was visited approximately 15 million times last year alone.

The Director of the Center, Dr. Stephen Feinstein, has particular expertise in the Holocaust, including the issues of art and the Holocaust, having written extensively and taught in this area. Additionally, Dr. Feinstein served on a National Endowment for the Humanities Review panel that reviewed, among other films, the newly-released documentary *The Rape of Europa* (2007), the most comprehensive documentary about the looting of art by the Nazis, and the efforts by the United States government and the allies immediately after World War II, and still ongoing, to restitute art to its rightful owners.

The **Holocaust Restitution Claims Practicum** of the Benjamin N. Cardozo School of Law ("the Practicum") was founded in 2000 by Dr. Lucille A. Roussin, a lawyer and art historian. The Practicum provides *pro bono* legal assistance, under the supervision of Dr. Roussin, to various agencies and

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[1] Pursuant to this Court's Rule 37 subd. 2.(a), all parties have consented to the filing of this brief by the *amici curiae*. Letters evidencing such consent are being filed with the Clerk of the Court with this brief. Pursuant to this Court's Rule 37 subd. 6, *amici* confirm that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members and their counsel, made a monetary contribution to the preparation or submission of this brief.

law firms that represent Holocaust victims. Dr. Roussin teaches a seminar for the Practicum's students, entitled "Remedies for War Time Confiscation," which examines the historical and legal framework of the restitution process. The Practicum is the only program of its kind at an American law school. Dr. Roussin is also in private practice.

*Amici* are interested in the instant litigation because its resolution by American courts will have a significant impact worldwide on the ongoing efforts to restitute Nazi-era looted art. *Amici* are concerned that the summary dismissal of the petitioners' well-founded and well-pleaded claims by the courts below on statute of limitations grounds, if allowed to stand, will have a chilling effect on the outcome of future and current unresolved claims involving Holocaust-era looted art. It is imperative that the law reasonably reflect the difficulties in establishing provenance of artworks looted during times of war, and especially during the Second World War.

Historically, the Holocaust represents the most extreme example of pillage of property that has been a prelude to almost every genocide. *Amici*'s involvement in this case is rooted in their conviction that the restitution of Nazi-looted property to its rightful owners is an integral part of efforts to ensure that the law does not sanction genocide and pillage.

*Amici* therefore urge the Supreme Court of the United States to grant the petition for *certiorari* in this case.

## SUMMARY OF THE ARGUMENT

1. The decisions of the federal courts below, which determined at the preliminary stage of a motion to dismiss, without a hearing, that the petitioners' claim was time-barred under California law, run directly counter to the express, consistently affirmed and continuing foreign and domestic public policy of the United States government to have Nazi-era looted art claims decided on their merits and to have such art returned to its rightful owners.

2. In light of this policy, and pursuant to this Court's ruling in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), a summary application of the California statute of limitations by the federal courts below interferes with the foreign and domestic policy of the United States with respect to Nazi-looted art, with the consequence that the state statute is pre-empted in these circumstances.

3. The courts below also erred in their determination of state law. In applying a supposed California strict doctrine of constructive notice in the circumstances of this case, the District Court and the Ninth Circuit overlooked a more recent on-point holding of the California Supreme Court in *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal.4th 797, (2005), which articulated a "delayed discovery rule" applicable when reasonable investigation could not have led to earlier discovery of the plaintiff's claim. In contravention of California authority, the Ninth Circuit completely failed to consider whether petitioners could reasonably have discovered their cause of action earlier. Such failure to ascertain and apply correct state law is itself grounds for granting the writ.

4. In the context of Nazi-looted art, statutes of limitations must be balanced with equitable principles such as *nemo dat qui non habet*, that require possessors of such art to establish due diligence and clean hands. The courts below failed to consider salient facts with respect to these factors raised by the petitioners. This approach, if allowed to stand, will essentially entrench the inevitability of adverse possession with respect to stolen art. This cannot be correct.

## ARGUMENT

### 1. THE DECISIONS OF THE COURTS BELOW IN THIS CASE RUN COUNTER TO THE CONSISTENTLY AFFIRMED PUBLIC POLICY OF THE UNITED STATES GOVERNMENT TO RETURN NAZI-LOOTED ART TO ITS RIGHTFUL OWNERS.

The pernicious result created by the decision of the District Court and affirmed by the Ninth Circuit is that a family whose artwork was stolen by the Nazis cannot be permitted to present evidence showing that it is legally entitled to claim such art. Moreover, the family is not even allowed to show that it made reasonable efforts to investigate their cause of action before bringing suit. Rather, according to the courts below, the family's claim can be summarily dismissed on statute of limitations grounds by a motion to dismiss, with the court simply concluding from the pleadings alone that the family should have earlier discovered the existence of their claim. The family is not given the opportunity to rebut this finding by showing either (1) that they could not have been reasonably aware of their claim, or (2) that the defendant possessor misled the claimants by her representations about the provenance of the artwork. Rather, on a motion to dismiss, and without regard to the facts alleged in the complaint concerning the reasonableness of any delay, the court can decide that the claim is conclusively time-barred.

Such a result is contrary to the consistent and expressed foreign and domestic policy of the United States to have Nazi-era looted art claims decided on their merits and to have such art returned to its rightful owners.[2]

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[2] *See* U.S. Department of State website, "Holocaust issues":

> The Office of the Special Envoy for Holocaust Issues *develops and implements U.S. policy with respect to the return of Holocaust-era assets to their rightful owners,*

(Cont'd)

The United States government has played a leading role in efforts to restitute Nazi-era looted art to the Jewish families or their heirs. Ambassador J. Christian Kennedy, the current U.S. State Department's Special Envoy on Holocaust Issues recently explained: "The United States was spared the ravages of the war, but as one of the Allied Powers it had a major role in returning artworks found in salt mines and other places of safekeeping after the war."[3]

This effort started in 1945 with the creation of Allied Forces' Monuments, Fine Arts and Archives section and its elite cadre (the so-called "Monuments Men") charged with locating and returning the art works to the countries from which the Nazis had stolen them.

Critical to the restitution effort was the promulgation of Military Government Law No. 59, enacted in 1947 in the American zone and similarly enacted in the British and French zones of occupation. Under this law all transfers of property

(Cont'd)

> compensation for wrongs committed during the Holocaust, and Holocaust remembrance . . . *This is an important issue in our bilateral relations with countries of central and eastern Europe and with the state of Israel.*

(Emphases added), *available at* http://www.state.gov/p/eur/rt/hlcst/ (last visited September 18, 2007).

*See also* Testimony of the Honorable Stuart Eizenstat, Under Secretary for Economic Affairs, U.S. Department of State before the U.S. Senate Foreign Relations Committee, April 5, 2000: "Our policy on Holocaust issues also serves important U.S. foreign policy interests . . ." *available at* http://www.usembassy-israel.org.il/publish/press/treasure/archive/2000/april/dt20407.htm (last visited September 18, 2007).

[3] J. Christian Kennedy, "The Role of the United States Government in Art Restitution," Address in Potsdam, Germany, April 23, 2007, *available at* www.state.gov/p/eur/rls/rm/83392.htm (last visited September 18, 2007).

after 1933 were presumed to be confiscations. Article 1 of MGL 59 states that "It shall be the purpose of this law to effect to the largest extent possible the speedy restitution of identifiable property . . . to persons who were wrongfully deprived of such property within the period from 30 January 1933 to 8 May 1945."

While the immediate post-war efforts to locate, sort, identify and return Nazi-era looted artworks were partially successful, many stolen artworks were not restituted. According to Ambassador Kennedy, "[w]ith some important exceptions it was not until the collapse of communism [in the 1990's] that a serious effort commenced to identify artworks that still had not been returned to rightful owners." (Kennedy address, *supra* n.3)

The United States again took the lead in these post-Cold War efforts to seek justice for Holocaust victims. In 1998, Congress asserted its jurisdiction over Holocaust restitution issues by enacting three laws: (1) the Holocaust Victims Redress Act, Pub.L. 105-158, 112 Stat. 15; (2) the Nazi War Crimes Disclosure Act, Pub. L. 105-567, 114 Stat. 2865; and (3) and the United States Holocaust Assets Commission Act, Pub. L. 105-186, 112 Stat. 611. In the Holocaust Victims Redress Act, Congress expressly affirmed its policy that "the same international legal principles applied among states should be applied to art and other assets stolen from victims of the Holocaust" (§ 201(5)). Section 202 of the Act provides:

> [A]ll governments should undertake good faith efforts to facilitate the *return of private and public property, such as works of art, to the rightful owners* in cases where assets were confiscated from the claimants during the period of Nazi rule and there is *reasonable proof that the claimant is the rightful owner*. (emphases added)

In 1998, the U.S. Department of State organized the Washington Conference on Nazi-Looted Assets, and looted art was a major focus of this conference. At the behest of the United

States, forty-four nations adopted the so-called Washington Conference Principles on Nazi-Confiscated Art (the "Washington Principles"). Ambassador Kennedy explained the straightforward goal of this U.S.-led initiative: "The Washington Principles are based on the simple premise that artworks displaced during the 1933-1945 period should be returned to rightful owners" (Kennedy address, *supra* n.3). The Principles thus expressly encourage "[p]re-war owners and their heirs...to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted" (Principle 7), and recognize the challenges that have delayed such efforts, by affirming that "[i]n establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era" (Principle 4).[4] Support for the Washington Principles remains a central element of U.S. foreign policy.[5]

The Picasso forfeiture case in California and the Schiele forfeiture case in New York are emblematic of the considerable efforts undertaken by U.S. federal officials to enforce the policy of restituting Nazi-era looted art to their rightful owners.

In 2000, the United States Attorney's Office in New York filed a civil forfeiture action under the National Stolen Property Act, 18 U.S.C. 2314 ("NSPA") to seize the painting by Egon Schiele, *Portrait of Wally*, which had been displayed in a Schiele exhibition at the Museum of Modern Art, on loan from the

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[4] Washington Conference Principles On Nazi-Confiscated Art, Released in connection with the Washington Conference on Holocaust-Era Assets, Washington, DC, December 3, 1998, *available at* http://www.state.gov/www/regions/eur/981203_heac_art_ princ.html (last visited September 18, 2007).

[5] U.S. Department of State website, "Holocaust Issues", *available at* http://www.state.gov/p/eur/rt/hlcst/c10071.htm (last visited September 18, 2007).

Rudolph Leopold Collection in Vienna, Austria. *See United States v. Portrait of Wally*, 2002 U.S. Dist. LEXIS 6445, 2002 WL 553534 (S.D.N.Y. 2002) and 105 F.Supp. 2d 288 (S.D.N.Y. 2000). The U.S. Government will turn over the painting to its proper owner only after a trial is held to determine on the merits which competing claimant is the rightful owner of the painting.

In 2004, the United States Attorney's Office in Los Angeles filed a civil forfeiture proceeding to seize a Picasso painting, *La Femme en Blanc*, in the possession of a private owner in Chicago. *See U.S. v. One Oil Painting Entitled "Femme en Blanc" by Pablo Picasso*, 362 F.Supp.2d 1175 (C.D.Cal. 2005). Thomas Bennigson, the grandson of the pre-war Jewish owner, commenced parallel legal proceedings in California against the current possessor of the painting, Marilyn Alsdorf, alleging that *La Femme en Blanc* was stolen by the Nazis from his grandmother. In the forfeiture proceeding, commenced after Alsdorf transported the painting from Los Angeles to Chicago after learning of Bennigson's California suit, the U.S. government argued that the painting was transported across state lines in violation of the NSPA. The seizure action was dropped after the parties settled the litigation.

The U.S. federal government today remains committed to seeing Nazi-era looted art returned to rightful owners. Ambassador Kennedy recently set out how Nazi-era looted art claims should be resolved. He explained that the United States seeks to have cases of Nazi-era looted art decided on the "circumstances under which the artwork in question moved from one holder to another during the turmoil that prevailed in Europe during the Nazi era and the immediate postwar period" rather than on "legal arguments that frequently deal solely with procedural issues" (Kennedy address, *supra*).

The decisions of the District Court and the Ninth Circuit below in the instant litigation are directly in opposition to the policy of the federal government, by allowing claims for the return of Nazi-looted art to be summarily dismissed on statute of limitations grounds.

## 2. WITH RESPECT TO NAZI-LOOTED ART, THE CALIFORNIA STATUTE OF LIMITATIONS IS PREEMPTED BY THE DOMESTIC POLICY OF THE UNITED STATES THAT SUCH ART BE RESTITUTED TO THE TRUE OWNERS.

In *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), this Court considered a challenge to the California Holocaust Victims Insurance Relief Act of 1999 ("HVIRA"), Cal. Ins. Code Ann. §§ 13800-13807, on the basis that the state statute interfered with the United States government's conduct of foreign relations. The Court concluded that the state statute was preempted. *Amici* submit that this same reasoning applies in the current case: a summary application of the California statute of limitations by the federal courts below interferes with the consistently affirmed domestic policy of the United States with respect to Nazi-looted art, with the consequence that the state statute is preempted in these circumstances.

The conclusions articulated by this Court in *Garamendi* apply in respect of Nazi looted art that is now held by United States residents and located within our borders. First, this is a matter well within the Executive's responsibility for foreign affairs. Moreover, with respect to Nazi-looted art, the Executive's responsibility is also rooted in the Constitution's Commerce Clause, which gives the federal government power to regulate interstate and foreign commerce. In the current case, as in many cases arising in U.S. courts concerning works of art in which there is evidence of Nazi coercion-tainted provenance, the painting was transported by the respondent across state lines (interstate commerce), after having entered the United States from abroad (foreign commerce).

Second, as in *Garamendi*, the United States Government has articulated and followed a particular policy. In *Garamendi*, this policy "to encourage European governments and companies to volunteer settlement funds in preference to litigation or

coercive sanctions" (539 U.S. 396 at 421) was expressed principally in the executive agreements with Germany, Austria and France, in addition to the pronouncements of state officials. In the current case, the federal policy is expressed, *inter alia*, in Acts of Congress, the Washington Principles adopted at the behest of the United States following the international Washington Conference organized by the U.S. Department of State, actions of the United States Attorney's Office, and consistent pronouncements of state officials.

It is thus evident that with respect to credible Nazi-looted art claims, the federal policy has been to resolve such claims on their merits, rather than by resort to procedural devices such as the statute of limitations. The state law as applied by the federal courts below is therefore in "clear conflict" with federal policy concerning the restitution of Nazi looted art, and pursuant to *Garamendi* the California statute of limitations cannot be applied so as to defeat federal policy concerning the restitution of such art to its rightful owners.

### 3. THE NINTH CIRCUIT FAILED TO FOLLOW CALIFORNIA STATE LAW WITH RESPECT TO STATUTES OF LIMITATIONS APPLICABLE IN THE CIRCUMSTANCES OF THIS CASE.

In a diversity case such as this, federal courts are required to follow and apply the law as articulated by state courts, and failure to do so constitutes a ground for granting *certiorari*. *See Exxon Company, U.S.A. v. Banque de Paris et des Pays-Bas*, 488 U.S. 920 (1988); *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940); *Six Companies of California v. Highway District*, 311 U.S. 180, 188 (1940). Moreover, in a diversity case, "it is the duty of the [federal court] in every case to ascertain from all the available data what the state law is and apply it." *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940). When a federal court fails to follow state law, *certiorari* may be granted on this question alone (*Six Companies, supra* at 185: "We granted *certiorari* limited to the question whether there

was error in that ruling [of the federal Circuit Court of Appeal in refusing to follow a state Court of Appeal decision]").

In the instant case, the Ninth Circuit correctly understood its obligation to ascertain state law: "If the state's highest appellate court has not decided the question presented, then we must predict how the state's highest court would decide the question. In doing so, we take state law as it exists without speculating as to future changes in the law" *Orkin v. Taylor*, 487 F.3d 734 at 741 (9th Cir.2007). However, the federal court's prediction of how the California Supreme Court would have ruled on the issue of statute of limitations in this case was patently incorrect. In applying a strict reading of *Jolly v. Eli Lilly & Co.* 44 Cal.3d 1103 (1988) to the circumstances of the current case, the Ninth Circuit clearly erred in its determination of state law, by overlooking the directly on-point and more recent holding of the Supreme Court of California in *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal.4th 797, 110 P.3d 914 (2005).[6]

In *Fox*, the Supreme Court of California considered a motion to dismiss (demurrer) raising a statute of limitations defense – precisely the same procedural route as was employed in the present case. The court in *Fox* reviewed its previous decisions with respect to statutes of limitations, including *Jolly*, and articulated a "delayed discovery rule" applicable when reasonable investigation by the plaintiff could not have led to earlier discovery:

> We conclude that, under the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, *unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a*

[6] Further authority for the salience of the principle of delayed accrual announced in *Fox* appears recently in *E-Fab, Inc. v. Accountants, Inc. Services*, 153 Cal. App. 4th 1308, 1323 (2007).

> *factual basis for that particular cause of action. In that case, the statute of limitations for that cause of action will be tolled until such time as a reasonable investigation would have revealed its factual basis.* (35 Cal.4th at 803, emphasis added)

The *Fox* decision further sets out the burden to be placed upon the plaintiff who invokes the delayed discovery rule:

> Simply put, in order to employ the discovery rule to delay accrual of a cause of action, a potential plaintiff who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of all potential causes of that injury . . . In order to adequately allege facts supporting a theory of delayed discovery, the plaintiff must plead that, despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period. (35 Cal.4th at 808-809).

The Ninth Circuit's strict application in the present case of *Jolly*'s principle of constructive notice, without taking account of the subsequently-decided *Fox* decision, is clearly inconsistent with the delayed discovery rule set out in *Fox*. The Ninth Circuit said that "[i]n assessing California law, we conclude that it is highly unlikely that the California Supreme Court would abandon the *Jolly* rule, much less adopt a new rule that eschewed the concept of constructive notice" (487 F.3d at 741). Yet it is apparent that in *Fox*, the Supreme Court of California did eschew a strict conception of constructive notice, by articulating the delayed discovery rule.

Contrary to the requirements of *Fox* – and without even considering what the "reasonable investigation" described in *Fox* would have included in the circumstances of this case – the Ninth Circuit concluded that "[e]ven under the most generous

possible rule for accrual of causes of action, the claims expired in or before 1993 – three years after the last public announcement of Taylor's ownership" (487 F.3d at 742). The courts below thus concluded that a claim against respondent Taylor was time-barred solely because her ownership of the Van Gogh painting had been publicly announced, once in 1963 when she purchased the painting and again in 1990 when she unsuccessfully attempted to sell it (487 F.3d at 741-742).

In this analysis, the Ninth Circuit erroneously concluded that merely because the claimants had constructive notice of the identity of the potential defendant, the claimants necessarily had the notice of all elements of their cause of action required to trigger the commencement of the statute of limitations. As the California Supreme Court confirmed in *Fox*, "ignorance of the identity of the defendant does not delay accrual of a cause of action, but that ignorance of a generic element of the cause of action does" (35 Cal.4th at 813). One "generic element" was described by the court in *Fox* as "wrongdoing" (35 Cal.4th at 807). Furthermore, as was affirmed in *Fox*, a "plaintiff has reason to discover a cause of action when he or she 'has reason at least to suspect a factual basis for its elements'" (35 Cal.4th at 807, *quoting Norgart v. Upjohn Co.*, 21 Cal.4th 383 at 398 (1999) *citing Jolly*, *supra* at 1110). A cause of action will only accrue for statute of limitations purposes when such "inquiry notice" of the elements of the cause of action can be reasonably ascribed to the claimant: "[P]laintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation" (*Fox*, *supra*, 35 Cal.4th at 808).

It is evident that the Ninth Circuit, like the District Court, completely failed to consider whether petitioners in fact could reasonably have discovered their cause of action years earlier. Neither court stopped to consider what would constitute a "reasonable investigation" in the circumstances of the heirs of

a Holocaust-era refugee, or what such reasonable investigation would have disclosed at an earlier time with respect to the key elements of petitioners' cause of action.

The Ninth Circuit recognized that it was required to "assume, for the purposes of our discussion, that the allegations of the complaint are true and that Mauthner was coerced into giving up the painting before she left Germany." *Orkin v. Taylor*, *supra*, 487 F.3d at 738. However, the court did not consider, as *Fox* required, whether the petitioners' cause of action would have been revealed by a reasonable investigation, at the time when Taylor's possession of the painting was publicly announced. Indeed, petitioners' complaint alleged facts amply supporting the conclusion of delayed accrual, by demonstrating their requisite "inability to have discovered the necessary information earlier despite reasonable diligence" (*Fox*, *supra*, 35 Cal.4th at 815).

Petitioners alleged that the grossly misleading information of the painting's provenance published in the ostensibly authoritative information provided by Sotheby's, Christie's and Taylor in 1963 and 1990 would not have revealed the true facts. Petitioners pleaded that those persons who might have had first-hand knowledge of the exact circumstances under which the painting was lost were unavailable when the painting surfaced in 1963. Mauthner died in 1947 at the age of 84, and her son-in-law and immediate heir died in 1964 in South Africa at the age of 86 after a long illness. Yet the courts below summarily assumed that an aged heir, living on another continent and ill, had reasonable notice of his claim when Taylor purchased the painting in 1963 in London.

Moreover, as noted in the petitioners' complaint, the sales brochure produced by Sotheby's for this 1963 auction was materially misleading with respect to the painting's provenance during the period between 1928 and 1945. Thus, according to petitioners' allegations, any reasonable investigation by them in 1963, or in the following years, could not have revealed the

elements of their cause of action against Taylor. Furthermore, as pleaded by the petitioners, the critical 1963 misinformation concerning the painting's provenance during the 1928-1945 period was not corrected. Rather, it was reproduced and further entrenched by Taylor and her agent, Christie's, when Taylor's possession received publicity in 1990. *See* Petitioners' original complaint as amended October 13, 2004, paragraphs 10-30 and 100; Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss, January 31, 2005, page 18; Brief of Appellants before the Ninth Circuit, pages 16-17, 27.

Instead of assuming the facts as alleged by petitioners to be true and then applying the law of delayed accrual to these facts – as required by the California Supreme Court in *Fox* – the Ninth Circuit erroneously concluded that constructive notice of the identity of the possessor was sufficient to bar the claim in its entirety. In so doing, the court denied the petitioners the opportunity to present evidence that any reasonable investigation could not have revealed their cause of action at an earlier time.[7] The Ninth Circuit thus impermissibly failed to apply the current law of the State of California, as clearly articulated in *Fox*.

*Amici* emphasize that the facts of this case amply illustrate the complex challenges inherent in establishing the provenance of art works between 1933 and 1945; extraordinary international efforts, good fortune, expertise and considerable resources are required for claimants to discover and substantiate the existence of claims. There is no established test for how "provenance" is defined, what materials constitute "authoritative" provenance,

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[7] In the event that the courts below felt that the Petitioners did not sufficiently plead the reasonable non-discoverability of the claim, it ought to have permitted Petitioners, pursuant to California law as confirmed in *Fox*, to file an amended complaint to plead such facts more particularly rather than granting the motion to dismiss. ("[I]t is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility [that the] defect...can be cured by amendment." *Fox*, *supra* at 810, *quoting Aubry v. Tri-City Hospital Dist.*, 2 Cal.4th 962, 967 (1992)).

how gaps in such information should be treated, or how the available information should be interpreted or presented, and errors are frequent and easily compounded. *See* Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 Seattle Univ. L.R. 631, 688-690 (2000). These challenges are further exacerbated by concealment and falsification of records that have been prevalent in the art market, particularly during WWII and in the post-Holocaust era. For example, as noted by this Court in *Republic of Austria v. Altmann*, 541 U.S. 677, 681-685 (2004), Maria Altmann only became aware of the key elements supporting her cause of action when Austrian archives were opened to private researchers in 1998 and a journalist discovered that the Museum had in previous decades attempted to conceal the details of its acquisition of the Klimt paintings.

The lower courts in this case completely ignored the real-world complexity of claims concerning Nazi-looted art, and California state law as articulated in *Fox*, when they summarily concluded – without any factual inquiry – that the petitioners "reasonably could have discovered, through investigation of sources open to them, their claim to and the whereabouts of the Van Gogh painting." *Orkin v. Taylor*, *supra*, 487 F.3d at 741. This error alone constitutes a recognized ground for granting *certiorari*.

## 4. IN THE CONTEXT OF NAZI-LOOTED ART, STATUTES OF LIMITATION MUST BE BALANCED AND RECONCILED WITH THE PRINCIPLE OF *NEMO DAT*, INCLUDING BY REQUIRING POSSESSORS TO ESTABLISH DUE DILIGENCE AND CLEAN HANDS.

*Amici* are deeply concerned that the decisions of the courts below granting the motion to dismiss brought by the respondent could set a very disturbing precedent with respect to both Nazi looted and other art stolen in zones of conflict that may be trafficked in the United States and abroad. The courts below

concluded that petitioners' claim was time-barred without considering the challenges of establishing provenance of art stolen during the Nazi period and the difficulties introduced by the widespread post-war practices of museums, dealers and private collectors to launder such art even in the face of questionable provenances. *See Menzel v. List*, 298 N.Y.S. 2d 979 (1969); *Rosenberg v. Seattle Museum*, 124 F. Supp.2d 1207 (W.D. Wash. 2000). All of these factors are amply raised by the claim presented by the petitioners, whose allegations must be deemed true at this stage of the proceedings.

The lower courts ignored all of these salient facts: the indifferent manner in which respondent bought the painting at Sotheby's in 1963; her constructive notice of the painting's status as Nazi looted art; her corresponding failure to take appropriate due diligence precautions against acquiring such art; the expertise of respondent's father, a professional art dealer who acted as her legal agent for the purchase in 1963; and respondent's own unclean hands in disseminating material misinformation concerning the painting's provenance, through the sales brochure produced by her agent Christie's in 1990.

In the case of art stolen during a time of war or genocide, the established principle of Anglo-American common law, *nemo dat qui non habet*, forms the legal expression of our moral belief that pillaging and theft should not be tolerated, much less rewarded. The passage of time should not dilute this principle, as unjust enrichment should have no statute of limitations when the victim could not and did not know of the facts constituting the injustice. The contrary approach – and the one at least implicitly adopted by the courts below in this case – essentially entrenches the inevitability of adverse possession with respect to stolen art. This cannot be correct.

## CONCLUSION

For all of the above reasons, the petition for a writ of *certiorari* should be granted.

Dated: La Mesa, California
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Respectfully submitted,

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